TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 29, 1906.

(20,071.)

(20,071.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Exhibit A—Statement of account	3	2
Amended petition	5	3
Exhibit A—Statement of account	6	4
Traverse	10	6
Findings of fact	11	7
Conclusions of law	14	11
Opinion	15	11
Judgment	23	20
Application for appeal	24	20
Order allowing appeal	24	21
Clerk's certificate	25	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1906.

1 In the Court of Claims.

No. 17349.

JOHN J. ALLEN
v.
UNITED STATES.

I.—*Petition. Filed February* 1, 1892.

To the Honorable Judges of the Court of Claims:

Your petitioner, John J. Allen a citizen of the United States, and a resident of Brooklyn in the State of New York respectfully shows:

That from the 29th day of January 1886, to the 15th day of January, 1892, he was a Commissioner of the Circuit Court of the United States for the Eastern District of New York, duly qualified and acting.

That during said time he issued his warrants for the arrest of various persons in said district for a violation of the laws of the United States on complaints duly sworn to and approved as required by rule of Court; that he issued subpœnas in said cases for witnesses to testify on behalf of the United States; that the warrants and
2 subpœnas were duly executed by the United States marshal, and where the defendants and witnesses were brought before him for examination the criminal charges were heard and disposed of by him according to the law and the evidence.

Your petitioner made up his accounts for said services, and charged the fees authorized by sections 847 and 828 of the Revised Statutes; that said accounts were duly verified and presented to the United States Court for its approval in the presence of the district attorney, and an order approving the same as being just and in accordance with law was entered of record.

That said accounts were then presented to the accounting officers of the United States Treasury Department for payment, and they refused to allow the sum of $1988.40, as per Exhibit "A" herewith; and although payment of said amount has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or department of the United States, but, on the contrary, allowance and payment thereof has been refused.

Your petitioner further shows that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof.

Wherefore your petitioner prays judgment against the defendant for $1988.40.

JOHN J. ALLEN.

By His Attorney, CHARLES C. LANCASTER.

3 EXHIBIT A.

The United States of America, Dr., to John J. Allen, a Commissioner of the Circuit Court of the United States for the Eastern District of New York, for services rendered on behalf of the United States, to wit:

1. For drawing complaints of affiants in various criminal cases for offenses against the laws of the United States from January 29, 1886, to January 1, 1892, 3,915 folios, at 20 cents per folio, 15 cents having been charged and allowed by the accounting officers, and 5 cents per folio now claimed.....$195 75

2. For drawing jurats to complaints in criminal cases from January 29, 1886, to June 30, 1889, one folio each, 1,268 folios, at 15 cents per folio.....$190 20

3. For reducing the testimony of witnesses to writing in various cases heard and decided from January 29, 1886, to June 30, 1888, 623 folios, at 20 cents per folio.....$124 60

4. For filing and entering 106 separate depositions of witnesses in various criminal cases heard and decided from January 29, 1886, to June 30, 1888, at 10 cents each.....$10 60

5. For services in criminal cases from October 14, 1886, to January 25, 1887, arising under chapter seven of title "Crimes" from section 5506 to 5523, inclusive, of the Revised Statutes, the fee of $10.00 in each case having been allowed by the accounting officers, the excess of fees charged in each case under sections 828 and 847, Rev. Stats., now claimed.....$289 60

6. For services in criminal cases from November 5, 1887, to December 23, 1890, where the fees are charged under sections 828 and 847, Rev. Stats., and not included by oversight in former accounts settled by the accounting officers and now claimed.....$44 85

7. For hearing and deciding on criminal charges from April 12, 1886, to January 14, 1892, where the complainant or others
4 had been examined on oath prior to issuing the warrant of arrest to determine whether the warrant should issue in various criminal cases where a written complaint had been made charging an offence against the laws of the United States, 78 days, at $5.00 per day.....$390 00

8. For drawing affidavits of supervisors of election and special deputy marshals, verifying the services rendered by them in connection with the Congressional election of 1886, the same being for verification of their accounts for compensation claimed, 1,944 folios, at 15 cents per folio.....$291 60

9. For administering oaths to supervisors and special deputy marshals, as to services aforesaid, at 10 cents each.....$97 20

10. For drawing jurats or certificates to above oaths upon the affidavits aforesaid, 1,944 folios, at 15 cents per folio.....$291 60

11. For certifying complaints with the records pertaining thereto in connection with the elections of 1886, for transmittal to the Chief Supervisor of Election- to be filed by him as records of his office, 416 folios, at 15 cents per folio..... $62 40

Total amount claimed..... $1,988 40

DISTRICT OF COLUMBIA:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition; that petitioner is justly entitled to the amount therein claimed from the United States after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 29th day of January, 1892.

A. S. TAYLOR,
Notary Public.

[SEAL.]

5 II.—*Amended Petition by Leave of Court. Filed February* 16, 1893.

No. 17349.

JOHN J. ALLEN
v.
UNITED STATES.

To the Honorable Judges of the Court of Claims:

Your petitioner, John J. Allen, a citizen of the United States, and a resident of Brooklyn, in the State of New York, respectfully shows:

That from the 29th day of January, 1886, to the 20th day of January, 1892, he was a Commissioner of the Circuit Court of the United States for the Eastern District of New York, duly qualified and acting.

That during said time he issued his warrants for the arrest of various persons in said district for a violation of the laws of the United States on complaints duly sworn to and approved, as required by rule of court; that he issued subpœnas in said cases for witnesses to testify on behalf of the United States; that the warrants and subpœnas were duly excuted by the United States marshal, and where the defendants and witnesses were brought before him for examination the criminal charges were heard and disposed of by him according to the law and the evidence.

Your petitioner made up his accounts for said services, and charged the fees authorized by sections 847 and 828 of the Revised Statutes; that said accounts were duly verified and presented to the United States Court for its approval in the presence of the district
6 attorney, and an order approving the same as being just and in accordance with law was entered of record.

That said accounts were then presented to the accounting officers of the United States Treasury Department for payment, and they re-

fused payment of fees for the following services, as per Exhibit "A" herewith attached:

EXHIBIT "A."

The United States, Dr., to John J. Allen, a Commissioner of the Circuit Court of the United States for the Eastern District of New York, for services rendered on behalf of the United States from January 29, 1886, to January 20, 1892, to wit:

1. For drawing complaints of affiants in various criminal cases for offenses against the laws of the United States, 3,915 folios, at 20 cents per folio, 15 cents per folio having been charged and allowed by the accounting officers, and 5 cents per folio now claimed, $195 75

2. For drawing jurats to complaints, 1 folio each, 2,284 folios, at 15 cents per folio..... $342 60

3. For reducing the testimony of witnesses to writing in various cases heard and decided, 3,370 folios, at 20 cents per folio.. $674 00

4. For filing and entering 175 separate depositions of witnesses in various cases heard and decided, at 10 cents each..... $17 50

5. For services in criminal cases arising under chapter seven of title "Crimes" from section 5506 to 5523, inclusive, of the Revised Statutes, the fee of $10.00 in each case having been allowed by the accounting officers, the excess of fees charged in each case under sections 828 and 847, Rev. Stats., now claimed..... $289 60

6. For services in criminal cases where the fees are charged under sections 828 and 847, Rev. Stats., and not included by oversight in former accounts settled by the accounting officers and now claimed $44 85

7. For hearing and deciding on criminal charges, where the complainant or others had been examined on oath prior to issuing the warrant of arrest to determine whether the warrant should issue, in various criminal cases where a written complaint had been made charging an offense against the laws of the United States, 78 days, at $5.00 per day..... $390 00

8. For drawing affidavits of supervisors of election and special deputy marshals, verifying the services rendered by them in connection with the Congressional election of 1886, the same being for verification of their accounts for compensation claimed, 1,944 folios, at 15 cents per folio..... $291 60

9. For administering oaths to supervisors and special deputy marshals, as to services aforesaid, at 10 cents each..... $97 20

10. For drawing jurats or certificates to above oaths upon the affidavits aforesaid, 1,944 folios, at 15 cents per folio..... $291 60

11. For certifying complaints with the records pertaining thereto in connection with the elections of 1886, 1888 and 1890, for transmittal to the Chief Supervisor of Election- to be filed by him as records of his office, 2,607 folios, at 15 cents per folio..... $391 05

12. Same services as in item 8 above for the Congressional election of 1888, 3,632 folios, at 15 cents per folio..... $544 80

13. Same services as in item 9 above for the Congressional election of 1888, at 10 cents each..... $181 60

14. Same services as in item 10 above for the Congressional election of 1888, 3,632 folios, at 15 cents per folio..... $544 80

15. Same services as in item 8 above for the Congressional election of 1890, 5,948 folios, at 15 cents per folio..... $824 70

16. Same services as in item 9 above for the Congressional election of 1890, at 10 cents each..... $274 90

17. Same services as in item 10 above for the Congressional election of 1890, 5,498 folios, at 15 cents per folio..... $824 70

8 18. For issuing warrants of commitment of defendants to jail in default of bail, at $1.00 each, and entering return of marshal, one folio, at 15 cents per folio, disallowed, as follows:

Report 128,359, items 1, 20.....	$2 30	
" 130,417, item 2.....	1 15	
		$3 45

19. For hearing and deciding on criminal charges in case U. S. *vs.* A. Ennis, where the proceedings consisted of taking testimony and taking bail, if tendered, and if not tendered, committing the defendant to jail, 1 day, at $5.00, disallowed, as follows:

Report 128,359, item 3..... $5 00

20. For filing and entering 2,180 separate complaints and warrants of arrest in cases for violation of the election laws where the warrants were returned unexecuted by the marshal, at 10 cents each, disallowed, as follows:

Report 128,359, items 5, 16.....	$117 60	
" 130,417, item 4.....	100 40	
		$218 00

21. For making certificate to copy of process in various cases where defendants were held for court, one folio each, at 15 cents per folio, disallowed, as follows:

Report 128,359, items 7, 9, 14, 18, 27..... $1 65

22. For drawing recognizance of defendants for further examination or for court, at 15 cents per folio, disallowed, as follows:

Report 128,359, items 11, 13, 21, 30, 33, 36..... $12 40

23. For drawing depositions for complaints in various cases of illegal registration, 4 folios in each case, at 20 cents per folio, disallowed, as follows:

Report 128,359, item 17.....	$275 20	
" 130,417, item 5.....	467 00	
		$742 20

24. For drawing jurats or certificates to acknowledgments of defendants and sureties to bail bonds, one folio each, at 15 cents per folio, disallowed, as follows:

Report 130,417, item 6..... $3 20

Total amount claimed..... $7,187 15

9 And although payment of said amount has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused.

Your petitioner further shows that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof.

Wherefore your petitioner prays judgment against the defendant for $7,187.15.

JOHN J. ALLEN.

By His Attorney, CHARLES C. LANCASTER.

DISTRICT OF COLUMBIA:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 13th day of February, 1893.

A. S. TAYLOR,
Notary Public.

[SEAL.]

10 III.—*Traverse. Filed May* 4, 1897.

In the Court of Claims of the United States, December Term, A. D. 1904-5.

No. 17349.

JOHN J. ALLEN
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition and amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

11 IV.—*Findings of Fact and Conclusions of Law. Filed January 9, 1905.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant, John J. Allen, was a commissioner of the circuit court of the United States for the eastern district of New York from February 1, 1886, to January 20, 1892, qualified and acting as such. He was also chief supervisor of elections for the district, acting as such.

II.

During said period he performed certain services in criminal proceedings and in cases heard and decided, and made up accounts for same, duly verified, which were presented to the circuit court of the United States for approval.

The court declined to make the usual order of approval, but made an order which, after reciting the proper presentation, said:

"And it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the Government in the matter of the approval of said account, and there being therefore no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the United States Treasury, and my official action herein bing limited to the particulars of which I am judicially cognizant,

"It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid."

The accounts covering items 1 to 17 in Finding III were made and presented for payment some time subsequent to the periods to which they relate and contained no charges besides those items, and none of the fees claimed in those items were charged in any other account presented to the accounting officers of the Treasury Depart-
12 ment for payment. Items 18 to 24 were contained in accounts paid in part, payment of these items 18 to 24 being refused.

III.

1. For drawing complaints of affiants in various criminal cases for offenses against the laws of the United States, 3,915 folios, at 20 cents per folio—15 cents per folio having been charged and allowed by the accounting officers, and 5 cents per folio now claimed, $195.75

These services were rendered during the period February 1, 1886, to June 30, 1889.

Of said complaints 162, consisting of 367 folios, were charged for

crimes of a general character not covered by chapter 7 of the title "Crimes," for which the amount claimed is..... $18.35

The remainder of said complaints charged offenses under said title and chapter, and warrants, if issued, were never served, because inquiry developed no offense had been committed.

2. For drawing jurats to 2,284 complaints of affiants charging offenses against the laws of the United States..... $342.60

Ninety-two of said complaints charged crimes of a general nature not included in chapter 7, title "Crimes," and the amounts charged for jurats threon is..... $13.80

All the remainder of said complaints charged offenses under said title and chapter. Warrants, if issued thereon, were never served; no arrests were made because inquiry developed the fact that no offense had been committed.

Respecting items 1 and 2, claimant's former accounts for services in the cases referred to were made up at the rates then uniformly fixed and were settled and paid in full.

3. For reducing testimony of witnesses to writing in various cases heard and decided, 3,370 folios, at 20 cents per folio..... $674.00

4. For filing 175 separate depositions of witnesses in various cases heard and decided, at 10 cents each..... $17.50

5. For services in 110 criminal cases arising under chapter 7 of the title: "Crimes," the fee prescribed by section 1986, Revised Statutes, $10 for each case..... $1,100.00

Upon which claimant has received detailed fees amounting to 810.40

Balance claimed $289.60

Arrests were made in each of the 110 cases, and the defendants were brought before the commissioner and the cases duly heard and decided.

6. For services in criminal cases where the fees are charged under sections 828 and 847, Revised Statutes, and not included, by oversight in former accounts settled by the accounting officers... $44.85

7. Withdrawn by claimant.

8. For drawing affidavits of supervisors of election and special deputy marshals, verifying the services rendered them in connection with the Congressional election of 1886, the same being for verification of their accounts for compensation claimed, 1 folio each, 1,944 folios, at 15 cents per folio..... $291.60

9. For administering oaths to supervisors and special deputy marshals as to services aforesaid, at 10 cents each..... $97.20

10. For drawing jurats or certificates to above oaths upon the affidavits aforesaid, 1 folio each, 1,944 folios, at 15 cents per folio, $291.60

13 Respecting items 8, 9, and 10, each one of the officers whose affidavit is charged for appeared before claiamnt, who drew his affidavit as to his services, administered the oath, and added the usual jurat.

The affidavits in question were required by the Department of Justice.

11. For certifying complaints in various criminal proceedings for violations of the elective franchise, with the records pertaining thereto, in connection with the Congressional elections of 1886, 1888, and 1890, for transmittal to the chief supervisor of elections, to be filed by him as records of his office, one folio in each case, 2,607 folios, at 15 cents per folio..... $391.00

The charges under consideration in all of said proceedings were those under chapter 7, of the title "Crimes." The claimant was at the same time the commissioner who certified and the chief supervisor of elections to whom he certified said complaints.

12. Same services as in item 8 above for the Congressional election of 1888, 1 folio, each, 3,632 folios, at 15 cents per folio..... $544.80

13. Same services as in item 9 above for the Congressional election of 1888, at 10 cents each..... $181.60

14. Same services as in item 10 above for the Congressional election of 1888, 1 folio each 3,632 folios, at 15 cents per folio.. $544.80

15. Same services as in item 8 above for the Congressional election of 1890, one folio each, 5,948 folios, at 15 cents per folio... $824.70

16. Same services as in item 9 above for the Congressional election of 1890, at 10 cents each..... $274.90

17. Same services as in item 10 above for the Congressional election in 1890, one folio each, 5,498 folios, at 15 cents per folio, $824.70

Respecting items 12 to 17, each one of the officers whose affidavit is charged for appeared before claimant, who drew his affidavit as to his services, administered the oath, and added the usual jurat. The affidavits in question were required by the Department of Justice, and the general form of the affidavit in question was submitted to and approved by the Department of Justice.

The fees in items 1 to 17 are not balances unpaid upon accounts presented and settled by the accounting officers; they are fees not previously charged in any former account.

18. For issuing warrants of commitment of defendants to jail in default of bail, at $1 each, and entering return of marshal, one folio, at 15 cents per folio..... $3.45

19. For hearing and deciding on criminal charges in case United States *v.* A. Ennis, where the proceedings consisted of taking testimony and taking bail, 1 day, $5 per day..... $5.00

20. For filing and entering 2,180 separate complaints and warrants of arrest issued for violation of the election laws in connection with the Congressional elections of 1888 and 1890, where the warrants were returned unexecuted by the marshal, at 10 cents each, $218.00

Services were rendered in civil-rights proceedings, but not in cases, and this item is disallowed.

21. For making certificate to copy of process in various cases where defendants were held for court, 2 folios each, at 15 cents per folio $1.65

No statute or rule of court shown.

22. Withdrawal by claimant.

14 23. For drawing depositions for complaints in various cases of illegal registration, 4 folios in each case, at 20 cents

per folio; oath to affiant, 10 cents; drawing jurat to same, 15 cents and filing complaints, 10 cents each..... $742.20

Services charged were in civil-rights proceedings. No warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences.

24. For drawing jurats or certificates to acknowledgments of defendants and sureties to bail bonds, 1 folio each, at 15 cents per folio (acknowledgments paid for)..... $3.20

IV.

The court finds upon the defendant's counterclaim that the claimant in his former accounts (which are the basis of this counterclaim) made certain detail fees, and charged for drawing and filing complaints, and where warrants were issued, entering return of the marshal on such warrants, amounting to $3,120.

The complaints all charged offenses against various defendants for violations of the provisions of chapter 7 of Title "Crimes," upon which a number of warrants were issued—how many does not appear—but no arrests were made in any instance and no execution of said warrants was effected. In instances warrants were not issued, but where issued were not served because inquiry developed that no offense had been committed. The accounts presented by the claimant for said services amounted to the sum of $3,120, which said sum was allowed and paid the claimant by the accounting officers by mistake, and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character. This practice was afterwards discontinued and detail fees disallowed except in cases of arrest, and statutory fees were allowed in all cases of arrest.

The amount counterclaimed is made up of charges for services rendered during the following periods, allowed and paid upon settlement of claimant's accounts for those periods by the accounting officers, as per Treasury reports specified, the accounts for each period being separate and distinct as follows:

Account for period July 1 to December 31, 1886, as per Treasury report 106861	$662.15
Account for period July 1, 1888, to June 30, 1889, as per Treasury report 131783	1,087.80
Account for period July 1, 1890, to June 30, 1891, as per Treasury report 133451	1,029.10
Account for period July 1, 1892, to December 31, 1892, as per Treasury report 134704	341.00

In settling the accounts in the counterclaim the charges were suspended by the accounting officers for explanations, which were furnished.

No disallowed balance in any account to which the counterclaim relates is sued for herein.

Conclusions of Law.

Upon the foregoing findings of fact the court decides as conclusions of law:

(1) That the claimant is entitled to recover judgment on items 1 for $18.35, 2 for $13.80, 5 for $289.60, 3, 4, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18 in the sum total of four thousand nine hundred and forty dollars and sixty-five cents ($4,937.45), all other items and charges being disallowed.

(2) That the defendants are entitled to recover judgment on their counterclaim, because of charges illegally and by mistake paid to him on the claim of the plaintiff in the presentation of his former accounts, in the sum of three thousand one hundred and twenty dollars ($3,120).

(3) That on the whole case the claimant is entitled to recover judgment in the sum of one thousand eight hundred and seventeen dollars and forty-five cents ($1,817.45).

15 V.—*Opinion of the Court.*

HOWRY, *J.*, delivered the opinion of the court.

This cause was heard and decided some years ago. Plaintiff thereupon filed a motion to amend the findings and for a new hearing generally. For some unexplained reason, although the motion was regularly docketed and called and Government counsel were always ready, the case was not brought to final hearing until the close of the last term. The questions presented by the motion are substantially the same originally argued and considered.

The plaintiff was a commissioner of the circuit court of the United States for the eastern district of New York from January 29, 1886, to January 20, 1892, and before and after. He was also chief supervisor of said district under the provisions of Title XXVI, Revised Statutes of the United States, entitled "Elective franchise." Between the dates mentioned, as commissioner, he presented accounts for services rendered the Government, which were duly audited and paid. The charges in those accounts, however, did not include the items covered in the present suit, and it is conceded that the accounts presented and paid contain the only charges which would have been allowed and paid at the time of their presentation.

Early in 1892 the plaintiff made up the account for $1,988.40, upon which the original petition in the case is based, covering specific services alleged to have been rendered for the six years preceding that time, and presented the same to the court for approval. After reciting that the account had been presented in the presence of the assistant district attorney, and that he had objected to none of the items, the court made the order shown in the findings.

Subsequent items were presented and approved in the same qualified language.

On the presentation of the various accounts payment was refused and notice of the disallowances given. The amendment to the peti-

tion introduced February 16, 1893, swells the total amount claimed to $7,187.15, made up of an aggregation of fees not presented with the regular accounts of plaintiff, but which he claims to have omitted for the most part, understanding that they would not be paid.

The defendants particularly object to those of the fees set forth in the bill of particulars growing out of alleged prosecutions under chapter 7 of Title "Crimes" relating to elections. As to those fees they contend that the statute (sec. 1986) has taken from the commissioner all fees in detail and substituted therefor a gross charge of $10 in each case, from which it would result that no charge can be allowed for drawing and filing complaints, per diems, administering oaths, and other services in detail, because there were no cases before the commissioner.

16 The findings explain in brief the allowances and disallowances. items 1, 2, 11, 20, and 23 in Finding III (with the exceptions noted) are hereinafter considered as relating to civil rights proceedings.

Item 3 of Finding III is for writing out testimony in 177 cases, 3,370 folios, or an average of 19 folios to each of the cases. The defendants submit that, in view of the refusal of the judge to make an unqualified approval of this item, that claimant's testimony is not sufficient to overcome the knowledge of the court that on the average 19 folios is much more than necessary for a commissioner to set down in substance the testimony upon any one hearing, who is by law restricted to four witnesses in the absence of a certificate by the district attorney that more were necessary, which certificate does not exist here. We can not say that the testimony is insufficient to disallow the whole item, nor that there was needless prolixity, as argued by the defense. We are without information, it is true, as to the particulars concerning these cases. The Government submits that 6 folios per case would be sufficient compensation. This would be an arbitrary rule to adopt, and in the face of the testimony of the plaintiff (which is all we have), alleging the necessity for the work and the number of folios, we allow the charge.

Item 4 is explained in the findings, and is allowed.

Item 5 is allowed on the showing that there were arrests and cases.

Item 6. Allowed as stated.

Item 7 is withdrawn.

Items 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18 are allowed and sufficiently explained.

Item 19. Disallowed because when suspended for explanation none was given. The requirement of the Department for an explanation was reasonable, and until complied with the court will not take jurisdiction. (United States *v.* Fletcher, 147 U. S. R., 664.)

Item 20 is disallowed.

Item 21. Disallowed as unauthorized, certificates being a permissible charge only when a rule of court or a statute requires them.

Item 22 is withdrawn by claimant.

Item 23 is disallowed.

Item 24 is disallowed, as claimant has been paid for acknowledgments.

Item 11. Is disallowed *in toto*. The charge for certificates can not be justified. The statute requires commissioners performing duties in Congressional elections to forward to the chief supervisor for the judicial district all complaints for preservation. (Sec. 2027, R. S.) The original complaints must be sent, not copies. It is the chief supervisor who must preserve and file the originals. The commissioner need not make copies for himself as commissioner. Another objection is that the transmission of these papers is imposed upon the commissioner by the same authority that puts upon him the power and duty to hear civil-rights cases, and the same statute limits his compensation in each case to $10, which would include this step in the proceedings of transmitting the papers to the chief supervisor.

The main question presented for determination is whether the plaintiff, as commissioner, is entitled to any fees in civil-rights proceedings when no arrests were made and no cases existed.

The liability of the defendants on this issue, which includes the right of the Government to counterclaim, depends upon the construction of the statutes relating to commissioners' fees in such proceedings. In the cases which have already been adjudicated,
17 relating to fees of commissioners in such proceedings, the exact question involved in this case, according to the contention of the counsel for the plaintiff, has not been passed upon. On the other hand, the defendants contend that the question is *res judicata* by the decision of the Supreme Court in Southworth's case (151 U. S. R., 179, and 161 U. S. R., 639).

The chapter relating to elections was limited to crimes against the elective franchise and civil rights of citizens. The provisions of the whole chapter were intended to protect the freedom and sanctity of the ballot in providing for the punishment of those preventing citizens from voting; of those intimidating voters; of those conspiring to injure citizens in the exercise of civil rights; of those depriving citizens of such rights under color of local law; of those voting or registering fraudulently, and of those obstructing the execution of process. Larger powers were given to commissioners to enforce the statute, but it was never intended to permit the official most responsible for the proper enforcement of such a law to become the instrument of partisans in any election by issuing warrants on trivial complaints or opening the doors to the careless and improvident use of process for selfish or unlawful purposes. The Congress was dealing with a subject that, in providing for the use of preventive measures to further fair elections, used precautions to protect the citizen in his right to vote without molestation.

Without some defined limit to fees of commissioners, it is manifest that statutes intended to protect citizens in their civil rights were liable to be used to vex and oppress the electors while unjustly increasing the fees of such officials. It seems reasonable, therefore, to suppose that there was an intention to deprive commissioners of the incentive to multiply fees in the unlimited issue of warrants based on mere suspicion without the exercise of the greatest circumspection and care and yet have every reasonable complaint acted upon by granting larger compensation in actual cases.

The plaintiff contends that the courts have recognized two distinct classes of services of commissioners—the judicial, referred to in section 1986, and the clerical, referred to in the sections preceding the one last quoted—resting compensation for each upon a separate basis; that there have been positive allowances of fees for drawing complaints *in ordinary cases;* that, referring to fees for complaints, the provision must be taken and construed liberally, on the theory that the Government does not require the services of commissioners without compensation; that in view of the requirement of the New York Code of Criminal Procedure (directing that when a person is accused of crime the depositions of the informant and prosecutor and others must be taken), the commissioner can lawfully make the charges by virtue of section 1014 of the Revised Statutes (U. S.), because by that section the law of the State must be observed to determine what is necessary, and, inferentially, what services can be charged for; that under the acts of Congress the arrested party must be brought for hearing before the nearest commissioner for trial, in which event the officer issuing the warrant would sometimes be deprived of any compensation whatever, and, finally, that the fee bill (sec. 847, R. S.) recognizes a distinction between services in a "case" and those of a preliminary character in all investigations and prosecutions of persons charged with crime against the laws of the United States.

Four sections of the Revised Statutes bear directly upon the question.

Section 1982 authorizes and requires district attorneys,
18 marshals, and deputy marshals, commissioners, and officers especially empowered, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of the chapter relating to elections. Section 1983 directs the circuit and district courts of the United States to increase the number of commissioners so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crime referred to in the preceding section, with authority invested in said commissioners, and the requirement as well, to exercise all the powers and duties conferred on them with regard to such offenses in like manner as they are authorized by law to exercise with regard to other offenses against the United States. Section 1984 empowers commissioners within their respective counties to appoint from time to time one or more suitable persons to execute all such warrants or other process as the commissioners might issue in the lawful performance of the duties, such warrants to run and be executed anywhere in the State or Territory within which they are issued. Section 1986 is as follows:

"The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and Territorial courts shall be paid for their services in cases under the foregoing provisions the same fees as are allowed to them for like services in other cases; and where the proceedings are before a commissioner, he shall be entitled to a fee of $10 for his services in each case, inclusive of all services incident to the arrest and examination."

The first clause of the last section in terms restricts compensation

of services rendered by district attorneys, marshals, their deputies, and the clerks of the courts to "cases." But plaintiff claims that as to commissioners the last clause of the section leaves them free to claim for clerical and ministerial services in all preliminary proceedings not resulting in cases; the fee of $10, which the statute declares them entitled to for services in each case, being for the performance of judicial duties. That clerical services in proceedings independent of cases must be compensated for as "extra judicial" labor under the New York Code of Criminal Procedure, as stated.

It is not meant to imply that a commissioner could at any time refuse to entertain complaints under any statute imposing the duty of issuing a warrant where reasonable ground existed to believe that a crime had been committed and that the person complained of had committed it. But where a commissioner is called upon to draw a complaint, administer an oath, and issue a warrant with the means at hand to verify the truth of the charge without making a case against the person complained of, it was clearly the duty of the officer to resort to these means to satisfy himself of the probabilities of the commission of the alleged offense.

The findings show that plaintiff was the chief supervisor under the chapter relating to the elective franchise at the time. Lists were in his hands or at his command containing the names of all persons entitled to vote. Where names upon these lists whose right to register or vote was honestly doubted it was the duty of the chief supervisor to verify the lists by proper inquiry and examination at the respective places assigned by the persons on the lists as their residences. (Sec. 2026, Rev. Stat.) Many of the complaints are stated by the commissioner—how many he does not specify—to have been found
19 to be errors of ignorance or unintentional misrepresentation or the like on the part of those charging the commission of offenses, and in such cases warrants were withheld. Some warrants issued under the circumstances set forth were not charged for, but others are charged for. No compensation can be claimed for this commissioner where an inspection of the lists and an inquiry at a residence would develop the probable truth of the matter favorably to those charged. For the service of examining poll books and making inquiries at residences, plaintiff was compensated in his capacity as chief supervisor. In not placing the warrants in the hands of the marshal at once to execute, plaintiff must also have had his doubts as to the propriety of doing so. While the law of the State in which the services are rendered can be looked to in ordinary cases to determine what are necessary, the law of no State would justify compensation for preliminary proceedings not resulting in cases under the statute which provided for compensation only in cases.

Nor does the law of any State for any kind of a proceeding not resulting in a case sanction over an act of Congress the practice of charging per diems before the issuance of warrants as shown by the seventh item of the present suit. (United States *v.* Patterson, 150 U. S. R., 69.) Under this authority this charge for hearing and deciding on criminal complaints to determine the issuance of warrants was abandoned at the hearing, but in connection with the other proof in the case it is clear that plaintiff made up in his account for 1886

per diems of $5 in "proceedings" but not in cases, and secured payment. The account for the year mentioned discloses items paid of $7.05 in such instances, of which $2.05 was evidently for the jurat, the filing of the complaint, entering and docketing the same, and issuing the warrant, and the other part of the charge for determining whether to take the complaint or not. These improper payments, few in number, are included in the counterclaim hereafter to be noted.

But it is urged that to deny compensation for clerical work without cases is a repeal of the general fee bill (fixing commissioners' compensation) by implication, which the law does not favor.

While repeals by implication are not favored, that principle can not be invoked against a statute defining for the first time a new class of offenses and fixing the standard of official fees at the same time.

The drawing of a complaint, administering an oath, and issuing a warrant are the incidents of a case. Without "cases" under the election laws these incidents for purposes of compensation to officers could not arise. The entire legislation on the subject was tentative. The authority for this is the statement of Mr. Justice Brown in Sherman *v.* United States (155 U. S. R., 682), where it is said: "It is evident that no permanent system for the carrying on of Congressional elections was intended to be established." But it is said Congress intended to increase the per diem allowed in other kinds of cases on the assumption that it would take an average of two days for hearing and deciding a single election case. Besides denying to all other officers charged with the duty of instituting prosecutions any fees unless there were cases (including the special officers provided for in section 1987), there is greater reason to believe that commissioners were not favored in the matter of fees to the disadvantage of their coadjutors in the work, for the reason that Congress did not intend to compensate for any service not connected with an actual prosecution under an experimental law. Whatever may be conjectured as to the time it would take to hear a case, the fact remains that many cases of any character can be sometimes heard in one day; and in election cases commissioners could do what they could not in other cases—charge double the per diem allowed in other cases for as many cases as could be heard in one day.

If the rule would now and then work injustice—as in cases where one commissioner issued the warrant and another heard the case on the return of the warrant by the officer executing it at some point in the State distant from the officer taking the complaint, and but one fee could be paid—the nonreturn of warrants before other commissioners prevented any loss of fees to the one issuing the warrant, until the passage of the act (preceding the final repeal of the whole chapter) conferring jurisdiction upon the nearest judicial officer before whom prisoners were required to be taken as arrests were made. (Act of March 3, 1893, 27 Stat. L., 609.)

The amendment to the law in the particular mentioned came so late and in correction presumably of inconvenience and wrong to the citizen in being subjected to answer complaints at points remote from the residence of such citizen, the action of Congress in this

amendment must be read without reference to its effect upon commissioners' claim for fees in cases of distant arrests.

But discussion is beside the question if the matter has been settled for us, as earnestly contended by the Government.

Southworth presented a claim (151 U. S. R., 179; 161 U. S. R., 639) alleging that as commissioner he made a docket entry of all the proceedings in each case, including *inter alia* the drawing of the affidavit, the issuing of the warrant, the return of the officer, the arrest and examination of the person charged in each case where an arrest was made, the number of oaths administered and affidavits filed, etc. As to 77 cases in which the persons arrested were held for trial his account was paid, but refused as to other cases. An amended allegation was introduced to show in a general way the facts and circumstances arising by the laws of Louisiana, from which the petitioner claimed he was justified in believing probable cause existed that offenses had been committed.

The court held: (1) That when a defendant was arrested and an examination held there was a criminal case entitling the commissioner to a fee, although the examination resulted in a discharge; (2) that when no arrest was made and no examination took place, no case had arisen within the meaning of Revised Statutes, section 1986, entitling the commissioner to the fee provided by law.

Because no charges were made for drawing complaints and issuing warrants, and no items stated which could form the basis of an account upon which the accounting officers or the court could pass, the plaintiff thinks the court could not on the record, and in fact did not, pass upon the legality or propriety of payment for "instituting" the prosecutions by taking the complaints. While the court did say, on the appeal of the plaintiff from the judgment of this court sustaining the demurrer of the Government to the whole petition, that it would consider the petition as though it alleged but one case before the commissioner, one complaint filed, one warrant issued, and one party arrested, and that the facts attending the prosecutions should be fully presented in order that the *bona fides* of the transaction might
21 be determined, it also said if the commissioner had proceeded in good faith to render services, acting upon a complaint manifestly intended to charge an offense, and, the defendant *having been arrested upon such complaint*, an examination was had, compensation would follow. As to 1,303 cases, in which there was an arrest, examination, and discharge of the defendant, a cause of action was stated and the cause remanded as to them.

We think the language used by the court, its reference to the statute applying fees to a "case" only, and the action directed to be taken to investigate charges only where there was an arrest, excluded consideration of all charges not in cases, the clerical as well as the judicial service.

Nothing in the Southworth case shows that he waived the lesser fees included in the greater claim except the mere fact that he thought he was entitled to $10 in what he called each case. His petition was framed on the theory that he was entitled to that or nothing, and, as we think, was finally decided on that theory.

The Treasury Department acted upon this construction and the

Department of Justice governed the action of its officers in dealing with other accounts as did the accounting officers of the Treasury. The plaintiff, however, had brought his suit before the Supreme Court had considered the question at all, and there was nothing left for him to do but still argue for constructive fees. There was something possibly to gain if he stood on his petition and much to lose if he did not.

Without impugning the good faith of the plaintiff on the record as presented, we think the warrants issued but withheld, whether any such are embraced in the counterclaim or covered in the present demand, were unnecessary. If the services in getting up these warrants were performed for the convenience of the officer, or were manifestly unnecessary *or useless*—even if they be such as he judges proper for himself—they can not be made the basis of a claim against the Government. (Dennison *v.* United States, 168 U. S., 241.)

As to the warrants issued but not served we will not establish a different rule for the Treasury than that accepted there for several years on the authority of the Southworth case, but will adhere to the letter and spirit of section 1986 as the safe rule applicable to the claim.

It is the only safe rule, too, if the amount allowed, in the language of the Southworth decision, "precludes the idea that the mere filing of a complaint and issue of a warrant is sufficient" to make cases from which alone fees can arise.

These views sustain the set-off of the Government to the extent of fees paid to the plaintiff on other accounts containing charges similar to those rejected here unless the counterclaim be denied application for reasons other than those considered and stated. The Treasury statement is not denied by the testimony of the plaintiff that charges and collections were made in some 1,400 or 1,500 instances where there were no cases. Plaintiff admits that presumably the Treasury statement is correct and establishes the findings of fact on the amount of the set-off.

It being made to appear that under a custom of the Treasury Department existing during the time covered by plaintiff's services and other accounts the provisions of section 1986 were ignored and commissioners allowed detail fees in civil-rights cases as in others,
22 and that plaintiff's former accounts for services where there were no arrests of persons accused of offenses under said chapter relating to the elective franchise had been allowed and paid, the defendants now demand that these improper allowances in the accounts of the plaintiff heretofore presented shall be deducted from the proper allowances of the present account. According to the certificate of the accounting officers in evidence, plaintiff was allowed and paid for services preliminary to the arrest of persons accused of offenses in civil-rights proceedings and where there were no cases sums aggregating $3,120.

But it is argued on behalf of the plaintiff that the court having "passed upon" the charges counterclaimed, its judgment approving the accounts and followed by their payment is conclusive, and can not be collaterally questioned through the counterclaim; the amounts

counterclaimed can not, in any event, be deducted from the sum due the claimant upon his petition, because an offset by the Government may be sustained only where there exists a running account between the parties or where the claimant reopens a settled account by suing for a balance disallowed upon such settlement, and where no peculiar circumstances appear to make recovery inequitable and the questions involved in the counterclaim have not been already judicially determined.

The multitude of authorities presented in support of these propositions need not be considered. We think the claimant has brought himself distinctly within the rule laid down by the Supreme Court in a matter recently adjudicated, where it is said that while it is not seemly for the accounting officers to rescind an allowance which has been made to an officer and pursue him to recover back the money paid thereon, yet when he comes into court and seeks to open up the same account it is not only proper, but their duty, to demand that any improper allowances should be deducted from any improper disallowances which may now be made good to him. (164 U. S., 190.)

The mistaken custom in the Treasury Department under which the plaintiff in this case received fees to which he was not entitled does not justify him in falling behind the mistakes of others on an unlawful demand of his own when he seeks to recover other amounts by suit against the Government which include unlawful charges of a character similar to those heretofore paid. The plaintiff now concedes the incorrectness of the methods of the accounting officers and seeks by one of his items to have reviewed all of the cases in which his detail fees amounted to less than $10 and to apply section 1986 now. He is entitled to enough to make up these fees to $10 in each "case," and this part of the demand proves the incorrectness of the charge in those items for specific fees where warrants were not served.

If the action of Department executive officers in matters of account and payment can not be regarded as a conclusive determination of the rights of the parties when brought in question in a court of justice; if, on grounds of public policy, the Government can not be bound by the action of its officers in making unauthorized payments, and if the person receiving money unlawfully paid can not retain the fruits of actions not authorized by law resulting from erroneous conclusions of Government agents as to the legal effect of the statutes under or in reference to which money has been paid, then we see no reason why the counterclaim in this case may not be maintained. The plaintiff denies that by his petition in the present suit he is attempting to reopen any of his former accounts, but the fact remains that items of the account in suit present for correction his former account.

If an executive officer like the Postmaster-General can cause suit to be brought where money has been illegally paid by reason of misconstruction or misapprehension of the law in reconsideration of prior decisions, and if, in his judgment, money has been paid without authority of law, and he has money of the same claimant in his hands, and may hold it subject to the decision of the court when

the claimant sues, we can find nothing in this case to prevent the Government from asserting the principle that a party receiving money illegally paid by a public officer is liable *ex æquo et bono* to refund. (Milchrist *v.* United States, 31 C. Cls. R., 403; Yoes *v.* United States, 30 C. Cls. R., 370; Wisconsin Central R. R. *v.* United States, 164 U. S. R., 190; McElrath *v.* United States, 102 U. S., 426.)

For the reason stated, we sustain the defendant's plea of set-off to the extent of the fees improperly and unlawfully paid to the plaintiff in the settlement of his former accounts. The amount of the counter-claim being $3,120, this sum, due to the United States, is ordered set off against so much of the demand of the plaintiff as is established by the findings to be due to him by the present account. The sum found due and payable by the account is $4,937.45, leaving a balance in plaintiff's favor (after deducting the amount of the set-off) of one thousand eight hundred and seventeen dollars and forty-five cents ($1,817.45), for which judgment will be entered.

23 *Judgment. Entered January* 9, 1905.

At a Court of Claims held in the City of Washington on the 9th day of January 1905, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises both for and against the Government and the claimant upon the petition of the claimant, and the counter-claim of the defendants, finds upon the whole case that the defendants are indebted to the claimant in the sum of Four thousand nine hundred and thirty seven dollars and forty five cents ($4,937.45/100) and that the claimant is indebted to the defendants in the sum of Three thousand one hundred and twenty dollars ($3,120.00/100)—and do order, adjudge and decree that the said John J. Allen, claimant, do have and recover of and from the United States the sum of One Thousand Eight Hundred and Seventeen Dollars and forty five cents ($1,817.45/100).

BY THE COURT.

24 *Application of Claimant For and Allowance of Appeal.*

No. 17349.

JOHN J. ALLEN
v.
THE UNITED STATES.

From the judgment rendered in the above entitled cause on the ninth day of January, 1905, the Claimant, by his attorneys, on the sixth day of April, 1905, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Claimant assigns as Errors of Law:

First. The conclusion of law made by said Court in disallowing

part of items 1 and 2 and all of items 11, 20 and 23 respectively of claimant's petition on the facts found by the Court.

Second. The refusal of said Court to render judgment in favor of the Claimant for the amounts claimed in said items.

Third. The allowance of the counter-claim filed by the Defendant.

C. C. LANCASTER,
HERBERT E. SMITH,
Attorneys for Claimant.

Filed April 6th, 1905.

April 10, 1905.—Ordered this appeal be allowed as prayed for.
BY THE COURT.

25 Court of Claims.

No. 17349.

JOHN J. ALLEN
vs.
THE UNITED STATES.

I John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of pleadings in the above-entitled cause, of the findings of fact and conclusions of law filed by the Court, of the opinion of the Court, of the final judgment of the Court, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of April A. D. 1905.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,071. Court of Claims. Term No. 192. John J. Allen, appellant, *vs.* The United States. Filed January 29th, 1906. File No. 20,071.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 20 1906
JAMES H. MCKINNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. [redacted]192

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

NOTICE OF MOTION
AND
SUGGESTION OF DIMINUTION OF RECORD.

LANCASTER & SMITH,
Counsel for Appellant,
1419 G STREET, N. W. WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

JOHN J. ALLEN, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 569.

NOTICE OF MOTION.

TO THE HONORABLE
WILLIAM H. MOODY,
ATTORNEY GENERAL OF THE UNITED STATES.

SIR:

Please take notice that we shall make a motion before the Supreme Court of the United States, at its Court Rooms in the Capitol in the City of Washington, District of Columbia, on the 22nd day of January, A. D. 1906, at 12 o'clock M., or as soon thereafter as counsel can be heard, that the plaintiff and appellant in this cause have a writ of certiorari for diminution of record herein, as per attached Suggestion of Diminution of record which will be presented to said Court at such hearing, a copy of which is herewith served upon you.

CHARLES C. LANCASTER,
HERBERT E. SMITH,
Counsel for Appellant.

Dated Washington, D. C., January 15th, 1906.

Due and personal service of a copy of the within motion and notice is accepted this 16th day of January, A. D. 1906.

HENRY M. HOYT,
Solicitor General U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

JOHN J. ALLEN, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 569.

SUGGESTION OF DIMINUTION OF RECORD.

Now comes John J. Allen, appellant, by Charles C. Lancaster, his counsel, and suggests to the Court a diminution of the record in this cause, in this, to wit:

I.

The Court of Claims omitted from its second findings of fact the various orders of the Circuit Court of the United States for the Eastern District of New York, being Exhibits C(2) and D(2) approving similar accounts of claimant covered by this suit for several years prior and subsequent thereto, as well as the order of approval by said Court of the accounts of the United States Marshal, United States Attorney, United States Clerk and other United States Commissioners for the Eastern District of New York, which were duly requested to be found by claimant in his request for findings of fact, and not objected to by counsel for defendant, as shown by the record in the Court of Claims, all of which is omitted from the transcript.

II.

The Court of Claims omitted from its fourth findings of fact Exhibits B(1 and 2). D(1) and E, being Report of the Department of Justice, Reports of the United States Attorney and United States Marshal and sworn Report of claimant to the Comptroller of the Treasury in settlement of his

accounts included in this suit, which were duly requested to be found by claimant in his requests for findings of fact and not objected to by counsel for defendant, as shown by the record in the Court of Claims, all of which is omitted from the transcript.

Wherefore, the said John J. Allen moves the Court, under rule 14, to award a writ of certiorari to be issued and directed to the judges of said Court of Claims, commanding that, searching the record and proceedings in said cause, they forthwith certify to this Court that part of said record so omitted as aforesaid. This motion is made for the reasons:

1. The Exhibits in item 1, being the orders of Court approving various similar accounts of the claimant and other officers of the Circuit Court of the United States for the Eastern District of New York, are material and conclusive in showing the uniform practice of the Court in approving accounts of the claimant in this suit and that the said order referred to and included in finding II of the Court of Claims was not an unusual or exceptional order, as found by the Court of Claims.

The claimant contends that the accounts so approved is *prima facie* evidence of the correctness of the items in the accounts, and in the absence of clear and unequivocal mistake on the part of the Court is conclusive.

Jones *vs.* U. S., 134 U. S., 483.
U. S. *vs.* Nix, 189 U. S., 775.

2. The records and reports contained in Exhibits B(1 and 2),——D(1)——and E show the uniform and continued action and custom of the United States Marshal, United States Attorney for the Eastern District of New York, the Department of Justice and the accounting officers of the Treasury, in investigating the prosecution of offences under the election law and the services rendered by the claimant contained in his accounts for the period of some twenty years, and conclusively show that said accounts were not paid by mistake

as found by the Court of Claims, nor illegally paid as referred to in said Court's opinion.

Uniform and uninterrupted practice and custom of the Department for many years has the force of law and these facts should be before this Court in order to properly determine this question.

U. S. *vs.* McDermott, 140 U. S., 151, item 3.
U. S. *vs.* Finnell, 185 U. S., 236.

In the United States *vs.* Adams, 9 Wall., 661; U. S. *vs.* Alonzo Childs, et. al., 76 U. S., 664; The Central Pacific R. R. Co. *vs.* The United States, 26 Ct. Cls., 109–138 U. S., 84, and United States *vs.* Nix, 189 U. S., 775, the writ of certiorari was pointed out as the proper writ to bring up to the Court of error, on an allegation of diminution of outbranches of the record or other documents, and writings in the Court below, which have not been previously certified or sent.

CHARLES C. LANCASTER,
HERBERT E. SMITH,
Counsel for Appellant.

State of New York, }
Eastern District of New York, } ss.

John J. Allen, being first duly sworn, upon his oath, deposes and says that he is the appellant in this cause; that he has read the foregoing statements and knows the contents thereof, and that the same is true in substance and fact to the best of his knowledge, information and belief.

JOHN J. ALLEN.

Subscribed and sworn to before me this 26th day of December, A. D. 1905.

{ SEAL }

B. LINCOLN BENEDICT,
U. S. Comr.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 569.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Reply Brief of Appellant on Motion for Diminution of Record and for Writ of Certiorari.

1. Counsel for appellee makes the objection to the first suggestion of diminution of the record in the above-entitled cause that the appellant failed to pursue his remedy in the Court of Claims by moving to have the findings amended.

The record in this case clearly shows that the claimant in the court below did make a motion to amend the findings to include the documents suggested in this motion and the court failed to include the facts in the finding (40 Ct. Cls., pp. 172 and 186).

So that it clearly appears that this motion is not made too late, as claimant had exhausted his remedy in the court below (U. S. *vs.* Adams, 9 Wall., 554).

Counsel for appellee, in his brief, on page 2, states that—

"If the Court of Claims had failed to find upon the subject-matter involved herein it might then be competent to require the evidence constituting the exhibits indicated to

be certified to this court in order to complete the record, but inasmuch as the Court of Claims made a clear, positive, and unequivocal finding, showing the form and character of the order of approval granted by the trial court which approved the accounts in question, it is not possible to now attack the veracity of that finding in this court."

The answer to this objection is conclusive upon examination of the finding of the court below, wherein the court found *as a matter of fact* that "the court declined to make the *usual order of approval*" (40 Ct. Cls., 172).

This finding of the court is a mixed question of law and fact, and an examination should be made of the orders of approval of the accounts of claimant and other court officers on file in the court below by this court to determine as a matter of fact as to whether the order set out in the finding of the court below is an *unusual* order. It will thus be seen that the finding of the court below is misleading and deprives the appellant of the material facts requested by him and not objected to by counsel for the defendant in the court below, so that this court can determine the essential fact and legal interpretation of the character of said order of approval.

The question is material to the appellant in order that he may have the benefit of the action of the court in approving his accounts as interpreted by this court in the cases of U. S. *vs.* Jones, 134 U. S., 483, and U. S. *vs.* Nix, 189 U. S., 775.

This motion is therefore not in conflict with rule 14 of this court.

2. In this motion the appellant asks this court to require the Court of Claims to include in its finding simply the records and reports on file and not objected to by counsel for the defendant below, so that this court can determine from the reports of the various officers who examined the accounts of claimant as to whether the accounting officers allowed the accounts of claimant *by mistake* and in pursu-

ance of the then practice of the accounting officers to allow detail fees in proceedings of that character.

These records and reports are *official documents* which speak for themselves, and are material evidence for appellant.

It is very material in the determination of this case that this court should have these documents in order to determine for itself what the practice of the Department was at that time and whether a legal inference could be drawn from said examination that the accounting officers did pay these accounts *by mistake* and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character.

Without all the essential, material. and undisputed facts in the court below this court cannot determine from the meager finding of the Court of Claims the all-important question of *mistake*, which may be one of fact as well as of law, and to determine the practice of the accounting officers.

It will thus be seen that there exists a material deficiency not only in the record, but on the face of the record, which can only be corrected by the granting of this motion (Elmore *vs.* Grymes, 1st Pet., 469).

Respectfully submitted.

CHARLES C. LANCASTER,
HERBERT E. SMITH,
Counsel for Appellant.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 15 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

CHARLES CALVERT LANCASTER,
Counsel for Appellant.

HERBERT E. SMITH,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23859

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of the Case.

FEES OF A COMMISSIONER OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

The facts as found by the court below are as follows:

I.

The claimant, John J. Allen, was a commissioner of the circuit court of the United States for the eastern district of New York from February 1, 1886, to January 20, 1892, qualified and acting as such. He was also chief supervisor of elections for the district, acting as such.

II.

During said period he performed certain services in criminal proceedings and in cases heard and decided, and made up accounts for same, duly verified, which were presented to the circuit court of the United States for approval.

The court declined to make the usual order of approval, but made an order which, after reciting the proper presentation, said:

"And it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the Government in the matter of the approval of said account, and there being therefore no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the United States Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant;

"It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid."

The accounts covering items 1 to 17 in Finding III were made and presented for payment some time subsequent to the periods to which they relate and contained no charges besides those items, and none of the fees claimed in those items were charged in any other account presented to the accounting officers of the Treasury Department for payment. Items 18 to 24 were contained in accounts paid in part, payment of these items 18 to 24 being refused.

III.

1. For drawing complaints of affiants in various criminal cases for offenses against the laws of the United States, 3,915 folios, at 20 cents per folio, 15 cents per folio having been charged and allowed by the accounting officers, 5 cents per folio now claimed.. $195.75

These services were rendered during the period February 1, 1886, to June 30, 1889.

Of said complaints 162, consisting of 367 folios, were charged for crimes of a general character not covered by chapter 7 of the title "Crimes," for which the amount claimed is $18.35

The remainder of said complaints charged offenses under said title and chapter, and warrants, if issued, were never served, because inquiry developed no offense had been committed.

2. For drawing jurats to 2,284 complaints of affiants charging offenses against the laws of the United States $342.60

Ninety-two of said complaints charged crimes of a general nature not included in chapter 7, title "Crimes," and the amounts charged for jurats thereon is..... 13.80

All the remainder of said complaints charged offenses under said title and chapter. Warrants, if issued thereon, were never served. No arrests were made because inquiry developed the fact that no offense had been committed.

Respecting items 1 and 2, claimant's former accounts for services in the cases referred to were made up at the rates then uniformly fixed and were settled and paid in full.

3. For reducing testimony of witnesses to writing in various cases heard and decided, 3,370 folios, at 20 cents per folio.....	$674.00
4. For filing 175 separate depositions of witnesses in various cases heard and decided at 10 cents each.....	17.50
5. For services in 110 criminal cases arising under chapter 7 of the title "Crimes," the fee prescribed by section 1986, Revised Statutes, $10 for each case.....	$1,100.00
Upon which claimant has received detailed fees amounting to	810.40
Balance claimed	$289.60

Arrests were made in each of the 110 cases, and the defendants were brought before the commissioner and the cases duly heard and decided.

6. For services in criminal cases where the fees are charged under sections 828 and 847, Revised Statutes, and not included by oversight in former accounts settled by the accounting officers	$44.85
7. Withdrawn by claimant.	
8. For drawing affidavits of supervisors of election and special deputy marshals, verifying the services rendered them in connection with the congressional election of 1886, the same being for verification of their accounts for compensation claimed, 1 folio each, 1,944 folios, at 15 cents per folio.....	291.60

9. For administering oaths to supervisors and special deputy marshals as to services aforesaid at 10 cents each..... 97.20
10. For drawing jurats or certificates to above oaths upon the affidavits aforesaid, 1 folio each, 1,944 folios, at 15 cents per folio.... 291.60

Respecting items 8, 9, and 10, each one of the officers whose affidavit is charged for appeared before claimant, who drew his affidavit as to his services, administered the oath, and added the usual jurat.

The affidavits in question were required by the Department of Justice.

11. For certifying complaints in various criminal proceedings for violations of the elective franchise, with the records pertaining thereto, in connection with the congressional elections of 1886, 1888, and 1890, for transmittal to the chief supervisor of elections, to be filed by him as records of his office, one folio in each case, 2,607 folios, at 15 cents per folio..... $391.00

The charges under consideration in all of said proceedings were those under chapter 7 of the title "Crimes." The claimant was at the same time the commissioner who certified and the chief supervisor of elections to whom he certified said complaints.

12. Same services as in item 8 above for the congressional election of 1888, 1 folio each, 3,632 folios, at 15 cents per folio..... $544.80
13. Same services as in item 9 above for the congressional election of 1888 at 10 cents each 181.60

14. Same services as in item 10 above for the congressional election of 1888, 1 folio each, 3,632 folios, at 15 cents per folio..... 544.80
15. Same services as in item 8 above for the congressional election of 1890, one folio each, 5,498 folios, at 15 cents per folio.... 824.70
16. Same services as in item 9 above for the congressional election of 1890 at 10 cents each 274.90
17. Same services as in item 10 above for the congressional election in 1890, one folio each, 5,498 folios, at 15 cents per folio.... 824.70

Respecting items 12 to 17, each one of the officers whose affidavit is charged for appeared before claimant, who drew his affidavit as to his services, administered the oath, and added the usual jurat. The affidavits in question were required by the Department of Justice, and the general form of the affidavit in question was submitted to and approved by the Department of Justice.

The fees in items 1 to 17 are not balances unpaid upon accounts presented and settled by the accounting officers. They are fees not previously charged in any former account.

18. For issuing warrants of commitment of defendants to jail in default of bail at $1 each and entering return of marshal, one folio, at 15 cents per folio..... $3.45
19. For hearing and deciding on criminal charges in case United States *vs.* A. Ennis, where the proceedings consisted of taking testimony and taking bail, 1 day, $5 per day 5.00

20. For filing and entering 2,180 separate complaints and warrants of arrest issued for violation of the election laws in connection with the congressional elections of 1888 and 1890, where the warrants were returned unexecuted by the marshal at 10 cents each.. 218.00

Services were rendered in civil-rights proceedings, but not in cases, and this item is disallowed.

21. For making certificate to copy of process in various cases where defendants were held for court, 2 folios each, at 15 cents per folio $1.65

No statute or rule of court shown.

22. Withdrawn by claimant.

23. For drawing depositions for complaints in various cases of illegal registration, 4 folios in each case, 20 cents per folio; oath to affiant, 10 cents; drawing jurat to same, 15 cents, and filing complaints, 10 cents each. $742.20

Services charged were in civil-rights proceedings. No warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences.

24. For drawing jurats or certificates to acknowledgments of defendants and sureties to bail bonds, 1 folio each, at 15 cents per folio (acknowledgment paid for)..... $3.20

IV.

The court finds upon the defendant's counter-claim that the claimant in his former accounts (which are the basis of his counter-claim) made certain detail fees, and charged for drawing and filing complaints, and, where warrants were issued, entering return of the marshal on such warrants, amounting to $3,120.

The complaints all charged offenses against various defendants for violations of the provisions of chapter 7 of title "Crimes," upon which a number of warrants were issued—how many does not appear—but no arrests were made in any instance and no execution of said warrants was effected. In instances warrants were not issued, but where issued were not served because inquiry developed that no offense had been committed. The accounts presented by the claimant for said services amounted to the sum of $3,120, which said sum was allowed and paid the claimant by the accounting officers by mistake and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character. This practice was afterwards discontinued and detail fees disallowed except in cases of arrest, and statutory fees were allowed in all cases of arrest.

The amount counterclaimed is made up of charges for services rendered during the following periods, allowed, and paid upon settlement of claimant's accounts for those periods by the accounting officers, as per Treasury reports specified, the accounts for each period being separate and distinct as follows:

Account for period July 1 to December 31, 1886, as per Treasury report 106,861.....	$662.15
Account for period of July 1, 1888, to June 30, 1889, as per Treasury report 131,783.....	1,087.80
Account for period July 1, 1890, to June 30, 1891, as per Treasury report 133,451.....	1,029.10
Account for period July 1, 1892, to December 31, 1892, as per Treasury report 134,704....	341.00

In settling the accounts in the counter-claim the charges were suspended by the accounting officers for explanations, which were furnished.

No disallowed balance in any account to which the counter-claim relates is sued for herein.

Conclusions of Law.

Upon the foregoing findings of fact the court decides as conclusions of law:

(1.) That the claimant is entitled to recover judgment on items 1, for $18.35; 2, for $13.80; 5, for $289.60; 3, 4, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18, in the sum total of four thousand nine hundred and forty dollars and sixty-five cents ($4,937.45), all other items and charges being disallowed.

(2.) That the defendants are entitled to recover judgment on their counter-claim because of charges illegally and by mistake paid to him on the claim of the plaintiff in the presentation of his former accounts, in the sum of three thousand one hundred and twenty dollars ($3,120).

(3.) That on the whole case the claimant is entitled to recover judgment in the sum of one thousand eight hundred and seventeen dollars and forty-five cents ($1,817.45).

Judgment was entered in accordance with said findings of fact and conclusions of law.

Errors of Law.

Claimant assigns as errors of law.

First. The conclusions of law made by said court in disallowing part of items 1 and 2 and all items 11, 20, and 23.

Second. The refusal of said court to render judgment in favor of the claimant for the amounts claimed in said items.

Third. The allowance of the counter-claim filed by the defendant.

ARGUMENT.

Item 1. The facts show that the claimant, as commissioner of the circuit court of the United States for the eastern district of New York, performed certain services in drawing complaints of affiants in various criminal cases from February 1, 1886, to June 30, 1889, alleging offenses against the laws of the United States, and in his quarterly accounts for said services he charges at the rate of 15 cents per folio, which were approved by the court, presented to the accounting officers of the Treasury, and paid.

Subsequently, on May 11, 1891, this court decided that the legal charge for drawing the complaint, as "for taking and certifying depositions to file" under section 847, Revised Statutes, was 20 cents per folio.

U. S. *vs.* Ewing, 140 U. S., 142, item 4.
U. S. *vs.* Barber, 140 U. S., 164, item 1.

Following this construction of the fee bill (section 847), the claimant made up a *new* account covering the services for the aforesaid period and charged the additional 5 cents per folio, which was approved by the court, as required by law, and presented to the accounting officers of the Treasury for payment, and payment was refused; whereupon the amount was included in this suit.

The court below found that part of these complaints, 162 containing 367 folios, charged crimes of a general character, and for these allowed the additional fee, amounting to $18.35.

The court below found that the remainder of the complaints, containing 3,548 folios, charged offenses under title LXX, chapter 7, Crimes, and rejected the fees, amounting to the sum of $177.40.

Item 2. The services embraced in this item were for drawing jurats to 2,284 complaints of affiants charging offenses

against the laws of the United States, one folio each, at 15 cents per folio, $342.60.

The court below found that 92 of said complaints charged crimes of a general nature and allowed the jurats in these, amounting to the sum of $13.80.

The court below found that the remainder of said complaints charged offenses under title LXX, chapter 7, Crimes, and rejected the fees, amounting to the sum of $328.80.

The court further found that "claimant's former accounts for services in the cases referred to in items 1 and 2 were made up at the rates then uniformly fixed and were settled and paid in full." These uniform rates as fixed by the accounting officers of the Treasury were only 15 cents per folio for drawing the complaint and no fee for drawing the jurat or certificate to the oath to the complaint, and the claimant, when these services were rendered, from February 1, 1886, to June 30, 1889, only charged 15 cents per folio for drawing the complaint and made no charge for drawing the jurat.

Subsequently, on May 11, 1891, this court decided that a commissioner was entitled to the fee of 15 cents per folio for drawing the jurat to the complaint.

U. S. *vs.* McDermott, 140 U. S., 151, item 1 (*a*).
U. S. *vs.* Barber, 148 U. S., 164, item 1 (*a*)

Following this construction of the fee bill (sections 828 and 847, Revised Statutes), which was *new* law, the claimant made up a *new* account covering the services for the aforesaid period and charged the fee of 15 cents for drawing the jurats to the complaints, which was approved by the court, as required by law, and presented to the accounting officers of the Treasury for payment, and payment was refused; whereupon the amount was included in this suit.

No fee of $10 was charged or paid in any of these cases.

From this record it will be seen that the original accounts for drawing the complaints in all the aforesaid cases were

settled and paid without any question as to whether the offenses were of a general character or were under title LXX, chapter 7, Crimes. The record further shows (p. 8) that it was the uniform practice of the accounting officers of the Treasury to allow the fee of 15 cents per folio for drawing complaints *in all criminal cases,* and made no distinction between offenses of a general character and offenses under title LXX, chapter 7, Crimes.

It will therefore be seen that this distinction and objection were made for the first time in the court below in this case. The question therefore for this court to determine is whether a commissioner of the circuit court of the United States, where these services were performed, was legally entitled to the fees authorized by sections 828 and 847, Revised Statutes, as construed by this court in the Ewing, McDermott, and Barber cases cited above.

The contention of the claimant is that sections 828 and 847, Revised Statutes, provide specific fees for specific services *in all criminal cases,* and when a specific service has been performed in good faith he is entitled to the specific fee authorized by the fee bill, irrespective of what subsequent service may be performed in the progress of hearing and deciding on criminal charges.

Instituting a criminal proceeding before a commissioner is defined by this court as follows:

> *"A criminal cause is begun in a commissioner's office by the filing of a complaint and the issuing of a warrant."*
> U. S. *vs.* Van Durzee, 140 U. S., 169, item 5.

Then *after* the prosecution has been thus instituted, the statute requires commissioners to hear and decide on criminal charges and to hold or discharge the defendant.

The institution of the prosecution is the *first* act; the examination and the holding or discharging of the defendant are subsequent distinct acts.

These latter two acts or classes of services may be, and

frequently are, performed by different commissioners, especially where the warrant is made returnable before another or nearer commissioner.

The courts recognize the two distinct classes of services of commissioners—the *judicial,* referred to in section 1986, and the *clerical* and *ministerial,* referred to in sections 828 and 847—and rest compensation for each upon a specific fee.

In U. S. *vs.* Jones (134 U. S., 483) this court said:

"For acts purely clerical and ministerial, such as administering oaths, taking acknowledgments, taking and certifying depositions to file, specific fees are provided, and for issuing writs or warrants or other service he has the same compensation as is allowed to clerks for like services.

"For acts not merely clerical but which are performed by the commissioner in his judicial capacity his fees are regulated on the basis of per diem compensation."

In U. S. *vs.* Patterson (150 U. S., 67), the foregoing is quoted as showing that the "hearing and deciding," for which $5 per day is allowed, "were clearly not of a clerical but of a judicial nature."

It is beyond the bounds of reason to suppose that the law intended that the commissioner who made the preliminary investigation, who examined and took the depositions of the complaining witnesses, who prepared the warrant and saw that it was placed in the hands of the marshal, or who selected and appointed a special officer to execute it should depend for *his compensation for all the labor, time, and attention required upon the chance, first, of an arrest, and, second, of the prisoner being brought before him rather than some other commissioner or magistrate.*

This contention is sustained by the uniform practice of the Treasury Department, as shown by the record in this case (R., p. 8), and decisions of the Comptrollers of the Treasury Department. On December 11, 1891, Comptroller Mathews, in adjusting the account of W. W. Gilbert, a commissioner of the circuit court of the United States for the

northern district of New York, per settlement report, 132,990 (records of Comptroller's office), decided as follows:

"Item 7. When warrant issued for violation of election laws is not executed, the commissioner is entitled only to the usual fee for issuing, filing and entering return of warrant. The excess is disallowed."

Subsequently, in adjusting the account of the same commissioner of December 31, 1892, per settlement report, 143,-518 (records of Comptroller's office), the same Comptroller decided:

"Item 9. In cases under election laws, if defendant is not arrested and tried, the commissioner is entitled only to fees for complaint and process. The excess is disallowed."

A fee of $10 was charged in each one of these cases.

It appears that this ruling was followed by subsequent Comptrollers up to the time of filing this suit. No decision can be found to the contrary,

Also the following authorities:

Patterson *vs.* U. S., 21 Ct. Cls., 322.
Wallace *vs.* U. S., 25 Ct. Cls., 519.

In the latter case the Department of Justice had issued instructions to commissioners not to charge in their accounts for drawing complaints and issuing warrants and subpœnas until the process had been returned. The process not having been returned, the court entered judgment for claimant for the fees for said services.

Faucett *vs.* U. S., 26 Ct. Cls., 159, items 9 and 10.
U. S. *vs.* Ewing, 140 U. S., 142.
U. S. *vs.* McDermott, 140 U. S., 151.
U. S. *vs.* Barber, 140 U. S., 164.
U. S. *vs.* Julian, 162 U. S., 324.

The facts in this case (R., p. 8) show that the claimant issued warrants of arrest on these complaints, but they were

not executed by the marshal and there was no arrest and examination.

In construing this section this court held in the Southworth case (151 U. S., 185):

"For it cannot be that a commissioner guarantees to the Government the sufficiency of the complaint filed before him, and is entitled to no compensation, if it be found defective. If he has proceeded in good faith to render services to the Government, acting upon a complaint manifestly intended to charge an offense, and, the defendant having been arrested upon such complaint, holding an examination, and rendering a judicial decision thereupon,—in the language of the statute" (section 847, Revised Statutes) "'hearing and deciding on criminal charges,' he is entitled to compensation. * * * It, of course, cannot be tolerated, in the absence of express language, that compensation is to be paid when the defendant is bound over for trial and not when he is discharged. That when the defendant is arrested and examination held there is a 'criminal case' is clear. That unless there be an arrest and examination, there is no 'case' within the meaning of section 1986 is equally clear. The amount allowed, ten dollars, precludes the idea that the mere filing of a complaint and issue of a warrant is sufficient. And the language of the Statute is plain. The allowance is for his services in each case, inclusive of all services incident to the arrest and examination.'"

It was on this theory and construction of the law that the claimant here charged only the specific fees provided by sections 828 and 847, Revised Statutes, for the specific services performed in *any* criminal case where there was no arrest and examination, and his first accounts for said services were settled and paid by the accounting officers of the Treasury in accordance with said theory and construction after full explanation and examination (R., pp. 8, 10).

Neither the claimant nor the Treasury Department made any distinction in the character of the offenses charged in the complaints, whether they were of a general nature or under title LXX, chapter 7, Crimes, since *all were crimes*

against the laws of the United States, and it was the duty of the commissioner to issue these warrants on complaints properly made before him, and there is not a particle of evidence in this record to prove that these complaints were improperly made or that the services were not actually and necessarily performed in good faith.

Section 1014, Revised Statutes, provides:

"For *any crime or offense* against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

In construing this section Justice Field said:

"The commissioner is made a magistrate of the Government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, *bound to hear all complaints of the commission of any public offense against the laws of the United States in his district,* to cause the offender to be arrested, to examine into the matters charged, and to commit for trial, or to discharge from arrest, according as the evidence fails or tends to support the accusation. For the faithful discharge of his duty, in these particulars, he alone is accountable. He has no divided responsibility with any other officer of the Government, nor is he subject to any other's control."

U. S. *vs.* Schumann, 2 Abbott, U. S. Reports, 523.
U. S. *vs.* Scroggins, 3 Woods, 532.

Section 1982, Revised Statutes, provides:

"The district attorneys, marshals and deputy marshals, the commissioners appointed by the circuit and territorial courts, with power to arrest, imprison, or bail offenders, and every other officer who is especially empowered by the Presi-

dent, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the title 'Crimes,' and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States or the territorial court having cognizance of the offense."

It will thus be seen that the law makes no class distinction between the crimes to be prosecuted before a commissioner of the circuit court. The first step in such prosecution is the drawing of the complaint and verifying the same before the commissioner charging an offense against the laws of the United States. The second is the issuing of a warrant and placing it in the hands of the marshal for execution. If the United States attorney should stop the prosecution at this stage of the proceedings, as in this case, because the warrants were not executed by the marshal, is the commissioner to receive no compensation for his services already performed, when the fees are specifically provided for said services by sections 828 and 847, Revised Statutes, and authorized by this court in several cases?

U. S. *vs.* Ewing, 140 U. S., 142.
U. S. *vs.* McDermott, 140 U. S., 151.
U. S. *vs.* Barber, 140 U. S., 164, 177.
U. S. *vs.* Allred, 155 U. S., 591.
U. S. *vs.* Julian, 162 U. S., 324.

It is confidently asserted that no practice of the Treasury Department nor any decision of the courts can be cited to sustain such an unjust and unreasonable conclusion.

For the first time, and in this case, it is decided by the court below that in prosecutions under section 1982, Revised Statutes, a commissioner is not entitled to any fees, unless there was an arrest and examination and the offender imprisoned or bailed, and then the only fee was ten dollars in each case, as provided by section 1986, Revised Statutes.

That section reads as follows:

"The district attorneys, marshals, their deputies, and the clerks of the courts of the United States and territorial courts shall be paid for their services, in cases under the foregoing provisions" (section 1982, Revised Statutes), "the same fees as are allowed to them for like services in other cases; and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination."

It is conceded by claimant, and so decided by this court in the Southworth case (151 U. S., 185), that under this section a fee of ten dollars can only be charged and allowed in a criminal case under title LXX, chapter 7, Crimes, when there was an arrest and examination and the case finally disposed of by committing or discharging the defendant. The object of the law was to give the commissioner a maximum fee of ten dollars in this class of criminal charges to cover all services where there was an *arrest and examination* in lieu of the fees provided for each service performed under sections 828 and 847, Revised Statutes, where the fees might be less or more, depending on the number of cases finally disposed of on each day. This was so decided in the Hazeltine case (26 Ct. Cls., 424).

It was the clear and manifest intention of Congress in passing this law to give a commissioner ten dollars in the prosecution of offenses against the election laws *when there was an arrest and examination and the case finally disposed of*. The theory and necessity for this legislation arose, no doubt, from the fact that under the old fee bill section 847, Revised Statutes, a commissioner was entitled to only one per diem at five dollars in a day for hearing and deciding on criminal charges, no matter how many cases were heard and decided on the same day, so that this per diem could be charged in only *one* of the cases heard that day, while in the others only the detail fees for the complaint, warrant, and taking bail or commitment could be charged, amount-

ing to but a few dollars. Section 1986 intended to change this and give the commissioner a fee of ten dollars in each case heard and decided. A controlling reason for this legislation was that Congress knew from experience that during the heat of election campaigns there would doubtless be numerous prosecutions for alleged violation of the election laws and many arrests and examinations of defendants by a commissioner on the same day, and in order to secure prompt final disposition of these cases and to avoid the possible temptation to continue the cases to earn a fair per diem in each under section 847, Revised Statutes, Congress sought to remove this temptation, with its possible injustice to the person arrested, by providing a fee of ten dollars in each case of *arrest and examination* so that the charge could be speedily disposed of.

The spirit and letter of the statutes are opposed to any construction which would cut off or reduce commissioner's fees for services in enforcing the law in question.

Not only was there no intent to belittle the office of the commissioners who were to enforce this law by limiting or reducing fees, but, on the contrary, the statute itself manifests a *positive intention to enlarge the importance and power of the office.*

Section 1984 authorized commissioners, in enforcing this law, to ignore the United States marshals and appoint, to execute their warrants, officers of their own selection having power to call to their aid the citizens, militia, and even the army and naval forces.

Section 1984 extended the authority of the commissioner's warrant beyond his district, through other districts of the State.

Section 1987 empowered commissioners, in these cases, to fix the fees of their officers for attending examinations, keeping prisoners, etc.

Section 1987 also gave the commissioners' officers *five* dollars for executing a warrant instead of the *two* dollars allowed a marshal by section 829.

These provisions greatly enlarged the commissioners' functions and the scope of their official powers and duties in this class of cases, and increased very largely their responsibilities.

It is therefore both unreasonable and incompatible with the evident purpose and spirit of the law to suppose that, in adding these provisions, there was any intention to cut their fees or take from them any benefits or advantages which they already possessed in ordinary criminal matters.

NO REPEAL OF OLD FEE BILL.

Apart from the foregoing, it is contended here on behalf of claimant that section 1986, Revised Statutes, did not repeal sections 828 and 847, Revised Statutes, except to the extent indicated above, either by express language or by implication, and that the provisions of sections 828 and 847, Revised Statutes, providing fees for services prior to the arrest and examination remained in full force and effect.

The reason is obvious, and fully set forth by this court in the Southworth case (151 U. S., 185) in the following words:

"For it cannot be that a commissioner guarantees to the Government the sufficiency of the complaint filed before him, and is entitled to no compensation if it be found defective. If he has proceeded in good faith to render services to the Government, acting upon a complaint manifestly intended to charge an offense, and, the defendant having been arrested upon such a complaint, holding an examination, and rendering a judicial decision thereupon,—in the language of the statute, 'hearing and deciding on criminal charges,' he is entitled to compensation. * * * It, of course, cannot be tolerated in the absence of express language, that compensation is to be paid when the defendant is bound over for trial and not when he is discharged."

This construction of the fee bill applies with equal force to the compensation herein claimed for services rendered in

good faith in drawing the complaints and issuing warrants of arrest which were not executed by the marshal. The commissioner is a judicial officer and the marshal is an executive officer, each with separate and defined duties. Neither is responsible to the other for his services performed in good faith, and there is no evidence in this record of the want of good faith on the part of either. Does a fair and legal construction of section 1986, Revised Statutes, deprive the commissioner of compensation for services rendered in good faith under sections 828, 847, and 1982, Revised Statutes, because the warrant was not executed by the marshal any more than if the defendant was discharged and not bound over?

In holding that it does the court below committed a fatal error of law, which it is confidently believed this court will correct in this appeal.

REPEAL BY IMPLICATION NOT FAVORED.

Unless absolutely irreconcilable, effect should be given to both section 1986 and sections 828 and 847, the unrepealed fee bill. This principle has been repeatedly affirmed.

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

Frost *vs.* Wenie, 157 U. S., 46.
U. S. *vs.* Healey, 160 U. S., 147.

Item 11. The services here performed are shown by the findings of fact (R., p. 9) and statement of case herein.

The findings of fact show that the original complaints, with the records pertaining thereto, were certified, and not copies, as seems to be erroneously intimated by the court below in its opinion. No copies were in fact made and no charge is here made for any copies whatsoever. The law required originals to be certified, and the claimant has strictly executed said law, which is as follows:

Section 2027, Revised Statutes.

"All United States marshals and commissioners who in any judicial district perform any duties under the preceding provisions relating to, concerning, or affecting the election of Representatives or Delegates in the Congress of the United States, from time to time, and with all due diligence, shall forward to the chief supervisor in and for their judicial district, all complaints, examinations and records pertaining thereto, and all oaths of office by them administered to any supervisor of election or special deputy marshal, in order that the same may be properly preserved and filed."

As this law directed that these complaints and records should be "properly preserved and filed" by the chief supervisor, they became thereby important records and the property of the United States. This law further directed that these complaints and records of the commissioner's office should be *officially* forwarded to the chief supervisor of election in order that he could ascertain thereby their official character. It was not the intention of this law that the commissioner should bundle these complaints, etc., in a bag or basket and dump them into the office of the chief supervisor, but that the complaint, with its records and papers in each case, should be put together and covered by a single authenticating certificate showing their official character and identifying them for the information and guidance of all officials or others having occasion at any time to refer to these records in complying with the requirements of section 2027, Revised Statutes, *no matter who held the office.* If sent without au-

thenticating certificates, there would be no official evidence to prove their identity or show their official character as "complaints, examinations, and records," or that they were the particular records embraced by section 2027 and transmitted under that statute, which permits the chief supervisor to properly preserve and file only certain specified records and examinations forwarded under that section. Their official identification required a certificate from the only official having knowledge of their character, namely, the commissioner sending them. *Such certificate and authentication is a condition precedent to the filing and preservation of the papers* for all time and all purposes.

An objection in the court below to this item was that the statute limits the fee in these cases to ten dollars, which includes this charge.

Section 2027 imposes upon commissioners a duty which is no part of the prosecution of a case by or before them. It is not incident to the prosecution or to the proceedings before the commissioner. The criminal proceeding is ended when the commissioner discharges the accused or holds him for trial and bails or commits him. The transmission of the papers to the chief supervisor is to be made afterward, but at no specified time. The papers are not sent to the district attorney to aid him in prosecuting, but to a record officer "to be preserved." Their transmission is therefore an extrajudicial or ministerial duty imposed by a special law which is no part of the criminal code.

That this service is independent of and distinct from the services incident to the arrest and examination, and is not covered by the fee of ten dollars given by section 1986, is clearly shown by the statutes as first enacted.

Section 1986, giving the ten-dollar fee, was enacted April 9, 1866 (14 Stat., 29, sec. 7).

Section 2027 was enacted February 28, 1871 (16 Stat., 437).

The services required by section 2027 were not required or

contemplated when section 1986 was enacted, and therefore were not included in the services for which the ten-dollar fee was provided.

The conclusion, therefore, must follow that the fees here claimed are allowable under sections 828 and 847, Revised Statutes.

As this certificate contained only one folio in each case, the claimant only charged a fee of fifteen cents for each certificate. The service and fee are provided for and authorized by the eighth clause of section 828 and the seventh clause of section 847, Revised Statutes, and is allowed in item 10 (R., p. 8), from which no appeal has been taken. These certificates were the same in character and form as those allowed in the suit by the same claimant in the Court of Claims, where judgment was rendered sustaining the legality of this very charge on June 27, 1892, and no appeal was taken by the Attorney General (Allen *vs.* U. S., No. 16,333), as shown by certified copy of findings of fact and conclusion of law, Finding II, item 5, hereto annexed as Appendix A.

A charge of the same identical character for like services in making such authenticating certificates was also adjudicated and allowed by the United States district court, eastern district of New York, in Allen *vs.* U. S., decided July 30, 1892, as shown in Appendix B hereto annexed, Finding III, item 2.

See also—

U. S. *vs.* McDermott, 140 U. S., 151, item 1 (*a*).
U. S. *vs.* Barber, 140 U. S., 164, item 1 (*a*).

Item 20. The facts as found by the court are on Record page 9.

As the facts here are similar to those in items 1 and 2 and the principle of law the same, it is deemed unnecessary to repeat the argument there made. The fee is specially au-

thorized by the third clause of section 828 and the seventh clause of section 847, Revised Statutes.

U. S. *vs.* Barber, 140 U. S., 164, items 1 (*b*), 2.

Item 23. The following facts were found by the court (R., pp. 9 and 10):

"For drawing depositions for complaints in various cases of illegal registration, 4 folios in each case, at 20 cents per folio; oath to affiant, 10 cents; drawing jurat to same, at 15 cents, and filing complaints, 10 cents each, $742.20.

"Services charged were in civil-rights proceedings. No warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences."

The same objection is made to this item as to items 1, 2, and 20 and the same authorities and argument apply.

The services performed and the fees herein claimed were similar in character and form to those included in the suit of the same claimant in the Court of Claims, where judgment was rendered sustaining the legality of the services and fees on June 27, 1892, and no appeal was taken by the Attorney General, as shown by certified copy of findings of fact and conclusion of law (Allen *vs.* U. S., 16,333), Finding II, item 3, hereto annexed as Appendix A.

COUNTER-CLAIM.

The facts found by the court below are in the record (p. 10) and statement of case herein.

This counter-claim is contested on several grounds, either one of which is sufficient in fact and law to establish its illegality:

First. The services and fees were clearly authorized by sections 1982, 828, and 847, Revised Statutes, as fully shown by the authorities and argument on items 1 and 2. If this court decides that the fees claimed in items 1 and 2

are legal and should be paid, it necessarily follows that the fees covered by this counter-claim are also legal and the original allowance correct. The record shows that this counter-claim is based solely on a point of law that, as there was *no arrest and examination*, no specific fees were authorized for the specific services performed.

Second. The record (pp. 7, 10) shows that the accounts covered by this counter-claim, as well as all the other accounts embraced in this suit, were duly presented to the United States court for approval, as required by the act of February 22, 1875 (18 Stats., 333), and orders approving the same as being just and according to law were entered of record. The accounts were then presented to the accounting officers and paid.

The attention of this court is called to the controlling fact that there is not a scintilla of proof in this record that the United States court made any mistake in approving these accounts of claimant, and in the absence of said proof the order of approval is conclusive.

In U. S. *vs.* Jones, 134 U. S., 483, this court held:

"The approval of a commissioner's account by a circuit court of the United States under the act of February 22, 1875 (18 Stats., 333), is *prima facie* evidence of the correctness of the items of that account; and *in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive.*"

This ruling was followed in U. S. *vs.* Barber, 140 U. S., 179, item 2, where this court decided:

"If the officers of the Treasury were at liberty to question the propriety of every charge in all cases, the approval of the court would be an idle ceremony."

This construction of the law was further affirmed and enlarged in U. S. *vs.* Nix, 189 U. S., 206, where this court said:

"We adhere to that view. It would be an insupportable burden upon the officers of court if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute."

The record (p. 10), however, shows that "in settling the accounts in the counter-claim, the charges were suspended by the accounting officers for *explanations, which were furnished," and the accounts were paid.*

These decisions and the facts found by the court below completely eliminate any intimation or insinuation within or without this record that the services of the claimant were not actually and necessarily performed in accordance with law and in absolute good faith.

Third. The findings are that the accounts of claimant for services from July 1, 1886, to December 31, 1892, covered by this counter-claim, were allowed and paid by the accounting officers by mistake and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character—that is, under sections 1982, 828, and 847, Revised Statutes, and title LXX, chapter 7, Crimes—and that this practice was afterwards discontinued and detailed fees disallowed except in cases of arrest, and statutory fees were allowed in all cases of arrest.

This is error. There was no such allowance by *mistake.* It must be seen that prior to December, 1892, the uniform and continuous practice and construction of the law in question by the accounting officers of the Treasury Department was to allow detail or specific fees for each service performed in *all criminal cases, including prosecutions under chapter 7, Crimes, both before arrest and after arrest and examination,* and subsequent thereto to allow detail fees only after the arrest, but in no case did they allow or pay a fee

of ten dollars under sections 1982 and 1986. This is clearly established by the above finding and also the finding in item 5, which reads as follows:

"For services in 110 criminal cases arising under chapter 7 of title 'Crimes,' the fee prescribed by section 1986, Revised Statutes, $10 for each case	$1,100.00
"Upon which claimant has received detailed fees amounting to	810.40
"Balance claimed	$289.60

"Arrests were made in each of the 110 cases, and the defendants were brought before the commissioner and the cases duly heard and decided."

This item was allowed by the court below.

This shows that the allowance of detail fees in election cases, as in the counter-claim, was not by *mistake*.

The Southworth case (151 U. S., 179) was not decided until January 8, 1894, nearly two years after the present suit was filed in the court below.

The continuous construction of a statute by the executive officers of the Government, whose duty it is to execute it, ought not to be overruled by the courts without cogent reasons.

Edwards *vs.* Darby, 12 Wheat., 206-210.
U. S. *vs.* Philbrick, 120 U. S., 52, 59.
U. S. *vs.* Johnson, 124 U. S., 236, 253.
U. S. *vs.* Ala. G. S. R. Co., 142 U. S., 615, 621.
U. S. *vs.* Finnell, 185 U. S., 244.

"It appears to have been the practice of the Department of Justice for the past twenty years to allow these as proper charges for drawing complaints, and, if there were any doubt as to the propriety of their allowance, such doubt, in view of this long-continued practice, should be resolved against the Government."

U. S. *vs.* McDermott, 140 U. S., 151, item 3.

"This principle has been applied as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the Government and those who deal with it and put faith in the action of its constituted authorities, judicial, executive and administrative."

U. S. *vs.* Hill, 120 U. S., 169.

It is not a case where the accounting officers were misinformed as to the length of the officer's service, nor where they overlooked a statutory restriction. It can hardly be said that the payments were made even in mistake of law, for the mistake relied upon depends upon a point of law *now raised and not yet decided.*

Patterson *vs.* U. S., 28 Ct. Cls., 321.

The principle involved in the case at bar is the same, as here 'the mistake relied upon depends upon a point of law *now raised for the first time and not decided.*"

Fourth. No accounts embraced in this suit reopen any former accounts settled and paid by the accounting officers.

The court below found the following facts (R., p. 10):

"No disallowed balance in any account to which the counter-claim relates is sued for herein."

This finding effectually disposes of the contention that this suit opened any settled account of the claimant.

But this counter-claim must be rejected because (1) no running account exists between the claimant, a commissioner of the circuit court, and the Government, and (2) its purpose is to recover back money paid on accounts heretofore settled and not reopened in this suit.

There is no running account between the Government and a commissioner. There is no continuing contract between them. Specified fees are paid for distinct services as they may happen to be rendered. The relations between a com-

missioner and the Government are renewed and cease with each separate service. He may continue in office indefinitely and never perform another service or render another account. Each one of his statements of charges is complete in itself. When a commissioner claims a fee it is never necessary to reopen a former account to decide whether payment shall be made. If, perchance, reference to a former account is made, as a guard against double payment, that is *not a reopening*.

There is nothing of a running or continuing nature in a commissioner's services or his accounts therefor.

The counter-claim relates to certain settled accounts, the settlement of which was acquiesced in by the United States and the claimant. Those accounts are not reopened in this suit. To reopen is to resettle, to readjust. An account is not reopened unless something in that account is both reconsidered and readjusted.

The claimant does not sue for any disallowed balances in those accounts.

A case in point is that of Mullett, a commissioner appointed to examine and report on the sale of navy yards, who sued in the Court of Claims for an additional sum due him. The Government counterclaimed certain expenditures before allowed him. In deciding on this counterclaim the court said:

"In the absence of fraud or mistake of fact such a settlement, after payment, cannot be reopened and the money recovered back. The distinction between this case and McElrath's (102 U. S., 426) is that there the claimant was in fact and in law, a stranger to the U. S. and the accounting officers were without authority of law to award him any balance whatever, and his so-called account had been kept open and finally adjusted by his own action; while here the account has been mutually adjusted and settled, the balance paid, and everything between the parties relating to the account for expenditures closed. The action of the claim-

ant does not attack the settlement but is to recover a balance remaining unpaid."

Mullett *vs.* U. S., 21 Ct. of Cl., 485.

No appeal was taken by the Attorney General.

In the case of Hillborn, to whom payments had been made under a mistaken view of the law, the Court of Claims said:

"In our opinion, when money is paid, after careful consideration of the law and facts by such high officials and upon settlement made by the accounting officers, it cannot be held that the district attorney received the money under such circumstances that in equity and good conscience he ought not to retain it, although it may appear that all those public officers were mistaken in their interpretation of the statutes and that he was not in law entitled to the compensation.

"Claimant is not seeking to reopen settlements. In his amended petition filed by leave of the court, he omits the claims embraced in those accounts and thus acquiesces therein. We hold that the settlements are equally binding upon the defendants and that money paid thereon cannot be recovered back on the plea of counter-claim."

Hillborn *vs.* U. S., 27 Ct. of Cl., 547.

No appeal was taken by the Attorney General.

As in Hillborn's case, the appellant does not seek to reopen his settlements. He has acquiesced in them. His suit is for recovery of *new items* standing unpaid.

Fifth. The amounts counterclaimed cannot, in any event, be deducted from the sum due the claimant upon his petition herein.

I.

A COUNTER-CLAIM BY THE GOVERNMENT MAY BE SUSTAINED, IN A PROPER CASE, ONLY (1) WHERE THERE EXISTS WHAT AMOUNTS TO A RUNNING ACCOUNT BETWEEN THE PARTIES; (2) WHERE THE CLAIMANT REOPENS A SETTLED ACCOUNT BY SUING FOR A BALANCE DISALLOWED UPON SUCH SETTLEMENT; (3) WHERE NO PECULIAR CIRCUMSTANCES APPEAR TO MAKE RECOVERY INEQUITABLE, UNJUST, OR UNLAWFUL; (4) WHERE THE QUESTIONS INVOLVED IN THE COUNTER-CLAIM HAVE NOT BEEN ALREADY JUDICIALLY DETERMINED.

Running accounts exist where employment and pay is of a continuing nature, as in the case of army officers, or where pecuniary relations to the Government are continuing, as in the case of paymasters, or where there are continuing contracts for special services, as for carrying mails.

A person who renders at indefinite times distinct services independent of any continued employment or contract, which services are paid for by separate fees, has no such running account or continuing contractual relation to the Government.

The rule is settled that an account heard and determined by accounting officers cannot be reopened for correction of error. The same is true of executive officers in general.

U. S. *vs.* Bank of the Metropolis, 15 Pet., 377.
Stotesbury *vs.* U. S., 146 U. S., 196.
Waddell *vs.* U. S., 25 Ct. Cl., 323.
Armstrong *vs.* U. S., 29 Ct. Cl., 148.
Cotton *vs.* U. S., 29 Ct. Cl., 207.
Opin. Black, 9 Opin. Att'y Gen'l, 34.
Opin. Bates, 10 Opin. Att'y Gen'l, 255.
Opin. Browning, 12 Opin. Att'y Gen'l, 386.
Opin. Bristow, 13 Opin. Att'y Gen'l, 456.

The rule, in general, is that payments made under mistake of law cannot be recovered.

Elliott *vs.* Swartout, 10 Pet., 137.
Lamborn *vs.* County Com'rs, 97 U. S., 181.
Midland Gt. Western R. *vs.* Johnson, 6 H. of L. Cas., 798.
Clarke *vs.* Dutcher, 9 Cow., 674.
Bank of U. S. *vs.* Daniel, 12 Pet., 32.
Pollock on Contracts (6th ed.), 439.

Equitable relief in general will not be granted for error after examination and judgment.

Hillborn *vs.* U. S., 27 Ct. Cl., 547.
Queen *vs.* Lord Com'rs of the Treas., 16 Q. B., 357.
Hunt *vs.* Rousmanier's Adm'rs, 1 Pet., 1.

Governments are not exempt from the application of the principles referred to.

Co. of Wayne *vs.* Randall, 43 Mich., 137.
Supervisors *vs.* Briggs, 2 Denio, 26.
Livermore *vs.* Peru, 55 Me., 469.

In transactions of a commercial character the Government must bear the consequences of its officers' neglect.

Cooke *vs.* U. S., 91 U. S., 389, 398.

And so in contract cases.

U. S. *vs.* Bostwick, 94 U. S., 53, 66.
U. S. *vs.* State Bank, 96 U. S., 30, 36.
U. S. *vs.* Smoot, 15 Wall., 36.

Where an officer, the validity of whose appointment was questionable, had rendered service, payment for which was made but subsequently counterclaimed as unlawfully granted, the court said:

"As the claimant, if not an officer *de jure,* acted as an officer *de facto,* we are not inclined to hold that he has received money which, *ex æquo et bono,* he ought to return."

Badeau *vs.* U. S., 130 U. S., 439.

In other words, as the services had been rendered the payment, although unlawful, must stand.

A class of cases is to be distinguished which appear to sustain the granting of relief to the Government against the acts of its officers, as, for example, where land patents are issued under mistake. Such cases are:

Mullan *vs.* U. S., 118 U. S., 271.

Shipley *vs.* Cowan, 91 U. S., 330.

Wis. C. R. Co. *vs.* Forsythe, 159 U. S., 47.

The principle in the latter class of cases differs from that involved in cases where money is reclaimed.

As said in Stone *vs.* U. S., 69 U. S., 525:

"The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."

Such patent could convey no right. Setting it aside deprives the holder of no property.

Other exceptional cases are those involving official action in excess of authority, non-compliance with express provisions of law, fraud, and the like.

For example, the Government will not be bound where an agreement was made with a Treasury agent having no power to contract.

Whiteside *vs.* U. S., 93 U. S., 247.

Or where an oral agreement was made which the law required to be in writing.

Hawkins *vs.* U. S., 96 U. S., 689.

Or where Government property was transferred irregularly and by private arrangement when the statute required public sale.

Steele *vs.* U. S., 113 U. S., 128.

In Steele's case a contractor for work on a vessel received old material at a price far below its value under an arrangement with an officer having no authority to make the agreement, and where the statute (Revised Statutes, 1541) required a public, not a private, sale. The court says:

"The delivery was without any authority of the Navy Department. * * * The whole transaction was illegal, and appellant is chargeable with knowledge of the fact. It was, in effect, a private sale of the property of the United States without survey, inspection or appraisement, at a grossly inadequate price."

A general principle was stated by the Supreme Court in a case where the Government sought to recover a claim paid to assignees of the claimant under a void assignment, the court saying:

"Under the circumstances, it is quite clear that if the controversy were between private parties there could be no recovery (1 Story Cont., sec. 541).

"With a few exceptions growing out of considerations of public policy, the rules of law which apply to the Government and individuals are the same."

U. S. *vs.* McKnight, 98 U. S., 179.

Respecting payments made by the Government under mistake of law, the authorities do not hold that they may be counterclaimed in the absence of existing circumstances excepting the case from the general rule.

In the case of Duval, receiver, in the Court of Claims, overpayments for carrying mails were made to a railroad, by mistake of fact, by the Post Office Department, not upon error of law. The terms of a land grant to the road, of

which it was aware, required it to carry mails for a reduced amount. Payments had been made on the contract from time to time, but there had been no settlement. The court held that, for the purpose of rectifying mistakes, statements showing items and balances for carrying mails on a contract may be regarded as running accounts, and payments made on such accounts in violation of law may generally be recovered back by counter-claim "where no peculiar circumstances appear to make such recovery inequitable or unjust." But in business matters the Government is bound by the acts of its officers in transactions within the line of their duty "under the principles of the law of agency as applied to individuals," and the court says:

"We constantly hold the Government concluded or estopped by such acts of its officers as form part of the *res gestæ*."

Duval, receiver, *vs.* U. S., 25 Ct. of Cl., 46.

In McElrath's case, in the Supreme Court, a naval officer resigned and applied for settlement of accounts. The accounting officers settled the same, and certified as due a sum equal to half pay and allowances. The claimant accepted it under protest, claiming full pay, and stating that he would not hold himself concluded as to the balance so claimed. He then sued for such balance, and the Government counterclaimed for the sum already paid him as not allowed by law. He had been in continuous service under regular pay, and his account was a running account and was so treated by the court.

The court held the first allowance illegal, saying that if the general rule in such cases would preclude the Government from reclaiming money paid under mistake of law simply that rule is inapplicable in this case, and—

"Had the claimant rested upon the settlement of his account by the proper officers of the Government, his right to invoke the general rule, to which we have referred, would

have been entitled to more consideration than it can now receive. Upon receiving the amount rewarded to him by the representatives of the Government, he distinctly announced his purpose not to abide by their settlement of his account; but, in disregard thereof, to demand an additional sum upon the basis of full pay and allowance from June 20, 1866, to July 10, 1873.

"This suit itself invites the court to go behind that settlement, to re-examine all the questions arising out of the claim of appellant for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government."

McElrath *vs.* U. S., 102 U. S., 426.

In Burchard's case a retired navy chaplain received three-quarters sea pay for four years, when the amount was reduced to one-half sea pay. He sued for the difference, and counter-claim was made for previous overpayment. This was held to be a running account, and the court said:

"In reality the account had never been closed and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the Department had no authority to allow him any more. If they did it was in violation of the law, and he has no right to keep what he thus obtained. Whether the Government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law is a question which it is not now necessary to decide any more than it was in McElrath *vs.* United States, 102 U. S., 426, 441, when it was suggested. This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected."

U. S. *vs.* Burchard, 125 U. S., 176.

Stahl's case involved the question of longevity pay for continuous service, to be fixed according to the lowest grade held " since last entering the service." He resigned when

assistant engineer, and the same day was commissioned in the higher grade of assistant constructor. The Department credited him with longevity pay according to the latter grade. He claimed such pay according to the former grade also. The court held his claim good, but, as his resignation was merely incident to promotion, his was "a continuous service," and, as in McElrath's case, the overpayment improperly made could be charged against his account. This account, like McElrath's and Burchard's, was a running account for continuous service under regular pay.

U. S. *vs.* Stahl, 151 U. S., 366.

The recent case of Wisconsin Cent. R. Co. *vs.* U. S., 164 U. S., 190, will be found in harmony with former decisions.

This was a case of continuing contract for carrying mails in which the Government counterclaimed overpayments by the Post Office Department of amounts not due because of land grants which required their deduction from compensation earned. Of this the company had knowledge.

The court holds that the Postmaster General, in directing payment under statutes fixing rates, does not act judicially, and that the rates due were not doubtful. The court says:

"We do not consider the true construction as doubtful, and that the departmental construction referred to was neither contemporaneous nor continuous."

The court cites the cases of Duval, McElrath, Steele, Burchard, Stahl, Whiteside, and Hawkins as declaring that in cases of that character executive decisions are not conclusive. It is important to note, however, that a special provision of the postal laws (section 4057, Revised Statutes) is cited as applicable and authorizing review of decisions in the Post Office Department and recovery of money paid by mistake, fraud, etc.

The court quotes from Duval's case (25 Ct. Cls., 46) that statements of

"balances due for carrying the mails ordinarily, and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue the same dealings between themselves; and that money paid in violation of law upon balances certified by the accounting officers generally may be recovered back by counter-claim or otherwise where no peculiar circumstances appear to make such recovery inequitable or unjust,"

and says that "the governing principle in the case before us is the same."

And the court finds that the case presented is one in which money illegally paid may be recovered back. It is careful to say that "there is nothing on this record" to render inapplicable the principle declared in the cases cited.

The decision in the Wisconsin Railroad case, summarized, is: There was a continuing contract for carrying mails; land grants to the road called for deduction of certain amounts from its compensation; having knowledge of this, it received these amounts; the Postmaster General in directing payment of these amounts acted ministerially, not judicially; what should have been paid was not doubtful; the cases of Duval, McElrath, etc., cited, settled the law for this case; a special statute authorized the recovery of amounts paid by mistake, fraud, etc., in postal cases; this was a running account; no peculiar circumstances appear to make recovery inequitable or unjunst, and "there is nothing on the record" to take the case out of the class in which money unlawfully paid may be recovered back.

The Wisconsin Railroad decision does not conflict with previous rulings; it merely applies them to that case. It declares no new law. It does not enlarge the scope of the principle announced in preceding cases, nor does it announce any new rule which would admit the present counter-claim to consideration; and, assuming that this counter-claim may

be considered, the principle is still upheld that it cannot be allowed if circumstances appear to make recovery inequitable and unjust.

The case of Yoes *vs.* U. S. (30 Ct. Cls., 370, and 31 Ct. Cls., 293) is distinguishable from the case at bar. That was a marshal's account, which is necessarily running and always open for adjustment. He must make return every half year of all his fees and expenses (Revised Statutes, 833), and can only retain an amount equal to his maximum compensation. The fees he earns are not his; he holds them in trust. The surplus he pays over, from fees deposited, is not made up of any particular fees, and so his maximum comes not from specified fees, but from the general fund. His is a continuing office for limited pay.

A commissioner's position is the reverse. His fees as received are his own. He makes no return and is not limited to a maximum. When he renders a service and is paid, his relations to the Government cease; his account is closed.

A marshal's account, on the contrary, is not the quarterly or half-yearly statement of charges which he makes, but the aggregation of them all, because by such aggregation only can the amount he may retain be determined.

In the Yoes case the counter-claim against Burchard (125 U. S., 176) is referred to as sustained not because his account was always open, but because he was overpaid.

We do not think the opinion, carefully examined, sustains this view. The court refers particularly to the open condition of the account. It will be noticed that in its conclusion the court sums up the important facts, namely, that the claim was for "a balance claimed to be due on pay account;" that "in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards;" that "his pay was fixed by law," he being an "officer of the navy," and he

was "overpaid," and that "under such circumstances the mistake may be corrected."

The important "circumstances" were that Burchard's was a running "pay account," of an "officer of the navy" in continuing service, whose "pay was fixed by law," and "the account had never been closed and was always open." Overpayment was merely incidental.

That the account was necessarily open is made a controlling characteristic of that case.

While, in the Yoes case, the account was necessarily reopened, it will be seen that there is no such reopening in the case at bar.

The character of the cases cited in which counter-claims have been allowed should be noticed, to wit: Wisconsin Railroad and Duval, overpayments on running accounts under continuing contracts for carrying mails; McElrath, Burchard, and Stahl, overpayments on running accounts of naval officers, whose services were of a continuing nature; Whiteside, agreement made by officer having no authority to contract; Hawkins, oral agreement when written contract was required; Steele, irregular delivery and private transfer of property when public sale was required; Yoes, overpayment to an officer who served continuously for a fixed maximum compensation and whose account was always open to adjustment.

It will be observed that in no case cited sustaining a recovery back of money paid was the departmental construction under which the unlawful payment was made contemporaneous or continued.

The great lapse of time since payment of the sums sought to be recovered back should alone forbid consideration of the counter-claim. It has been declared to be "exceedingly dangerous doctrine" that where the United States had acted on a settlement and paid the sum found due such settlement can be opened or set aside years afterwards—

"when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States are intact, owing to its not being subject to any act of limitation."

U. S. *vs.* Johnston, 124 U. S., 236, 255.

Furthermore, an important feature of the case at bar distinguishes it from every case cited in which the Supreme Court has sustained a counter-claim.

In each one of those cases the basis of the original payment was merely a department ruling, without the characteristics or force of judicial action. In the present instance, however, the amounts counterclaimed were paid after a judicial determination, made under the act of February 22, 1875, upon a hearing by the court, and subsequently affirmed by the revisory power of the accounting officers.

None of the counter-claims referred to sustained by the Supreme Court involved any question which had been presented for the determination of a court or which had received judicial consideration.

This distinctive feature of the case at bar alone renders inapplicable to it any principle bearing upon the question of counter-claim established in the cases referred to.

ERRORS OF FACT IN THE OPINION OF THE COURT BELOW.

It is alleged below (p. 7) that the United States court to which claimant's accounts were submitted "declined to make the usual order of approval." This is not the fact. The substantial part of the order appears on Record page 7. This was the usual and uniform order of approval of the United States circuit court, eastern district of New York, not only of claimant's accounts, but of those of the marshal, clerk, district attorney, and other commissioners during a long period of years, including the years in question. This is shown by certified copies of such orders approving similar accounts during many years before, including and after the

period of the account in question hereto annexed as Appendix "C."

It is assumed that this court will take judicial notice of these orders of court.

The circuit court did not decline to make the usual order. It made the same order it uniformly made.

This form of order is in strict compliance with the act of February 22, 1875 (18 Statutes, 333). The same form of order was held sufficient in Allen *vs.* U. S., Ct. Cls., 16,333.

It fully expresses the court's approval of all of which it can be judicially cognizant. The court cannot properly express more than this in its judicial capacity.

The court below does not declare this form of order insufficient, and its criticism of it is, as shown, without foundation in fact.

This approval, therefore, was an adjudication of the correctness of the items of the charges to which it related.

U. S. *vs.* Jones, 134 U. S., 483.

Apparently to fortify the offsetting of the counter-claim, it is stated in the opinion below (R., pp. 15, 16) that the counter-claim included payments, "few in number," of per diems charged for determining whether to issue the warrant. This assertion is contrary to the fact and without a particle of evidence in the findings of fact to support it. The Government introduced no evidence whatever respecting the accounts counterclaimed, and not a word in the findings substantiates the allegation in question. It is a bare assertion, having no other support than the statement accompanying it that the account for 1886, in the counterclaim, "discloses items paid of $7.05," which, the opinion says (R., p. 16), was "evidently" $2.05 for the jurat, filing the complaint, entering and docketing the same, and issuing the warrant, and the other part, $5, "for determining whether to take the complaint or not." The opinion cites

no evidence, but says "evidently" the charge was so made up.

On the contrary, the record shows that the charge was evidently "not so made up." The finding is (p. 10) that payment of this charge was suspended for explanation, which was furnished and the charge then paid. It is evident that if this scrutiny and proof had not shown that the $7.05 covered a per diem for hearing after arrest it would not have been paid. This, therefore, refutes any suggestion that it included an improperly charged per diem. The proof was that the $7.05 in question was charged only where there had been an arrest and hearing, and that only $2.05 was charged in some such cases and $7.05 in others was because when two or more defendants were arrested and before the commissioner on the *same day* a per diem could be charged in one case only, making $7.05 in that case and $2.05 in the others. There was no ground whatever for the wrongful allegation in the opinion that the $7.05 included a per diem except for a hearing after arrest.

In the opinion of the court below (R., p. 18) the following statement is made:

"Without impugning the good faith of the plaintiff on the record as presented, we think the warrants issued but withheld, whether any such are embraced in the counterclaim or covered in the present demand, were unnecessary. If the services in getting up these warrants were performed for the convenience of the officer, or were manifestly unnecessary or *useless*—even if they be such as he judges proper for himself—they cannot be made the basis of a claim against the Government."

This is misleading and contrary to the fact. This claimant during his entire term of office as commissioner—over twenty-five years—has never charged in any account rendered a fee for issuing a warrant of arrest unless the same was placed in the hands of the marshal for service and due return made thereon by him, which was entered of record on

the claimant's docket. No fee is charged or claimed in this record for issuing any warrant of arrest withheld or not placed in the hands of the marshal for execution.

This is sustained by the findings of fact, and no proof whatever was offered by the defendant in the court below to contradict this fact or to prove that the services of claimant were useless.

Referring to the opinion of the court below (R., p. 19), the following statement is made:

"The plaintiff now concedes the incorrectness of the methods of the accounting officers and seeks by one of his items (5) to have reviewed all of the cases in which his detail fees amounted to less than $10, and to apply section 1986 now. He is entitled to enough to make up these fees to $10 in each 'case,' and this part of the demand proves the incorrectness of the charge in those items for specific fees where warrants were not served."

This is misleading and is not the fact, for the claimant does not seek to review or reopen any former settled account or to claim any balance due on said account, as proven by the following finding of facts (R., p. 9):

"The fees in items 1 to 17 are not balances unpaid upon accounts presented and settled by the accounting officers; they are fees not previously charged in any former account."

Also on Record page 10:

"No disallowed balance in any account to which the counter-claim relates is sued for herein."

The claimant only seeks to recover in this *new* account (item 5) the fees which he claims are authorized by law, but which would not have been paid when the original or old accounts were settled and paid under the then practice of the accounting officers.

This is sustained by the opinion of the court (R., p. 11) in the following words:

"Between the dates mentioned (January 29, 1886, to January 20, 1892), as commissioner, he presented accounts for services rendered the Government, which were duly audited and paid. *The charges in those accounts, however, did not include the items covered in the present suit, and it is conceded that the accounts presented and paid contain the only charges which would have been allowed and paid at the time of their presentation.*"

Upon the whole case, it is submitted that this appeal should be sustained on all points at issue.

CHARLES CALVERT LANCASTER,
Counsel for Appellant.

HERBERT E. SMITH,
Of Counsel.

APPENDIX "A."

COPY.

IN THE COURT OF CLAIMS.

No. 16333.

JOHN J. ALLEN
vs.
THE UNITED STATES.

Findings of Fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On September 22d, 1874, claimant was appointed a commissioner of the circuit court of the United States for the eastern district of New York, and has continued to hold said office up to the present time.

II.

As such commissioner as aforesaid he has performed services in cases in which the United States was party or interested, and for which service the United States is liable for the payment of the lawful fees, as follows:

1.	For hearing and deciding on criminal charges, 87 days at $5 per diem....	$435.00
2.	" administering 173 oaths to depositions of special deputy marshals at 10¢...	17.30
3.	" *drawing complaints in 976 cases, 4 folios each, at 15¢ per folio, 60¢; oath thereto, 10¢; filing same, 10¢; total 80¢ each*.....	780.80

4.	For drawing depositions of special deputy marshals and supervisors, 1,058 depositions, 2 folios each, 2,116 folios, at 15¢ per folio	317.40
5.	" *certifying complaints, with the records pertaining thereto, for transmittal to the chief supervisor of elections, 2,696 folios, at 15¢ per folio*	404.40
6.	" 748 oaths of office of supervisors and special deputy marshals at 2 folios each, 1,496 folios, at 15¢ per folio	224.40
7.	" issuing and entering seven commitments at $1.15 each	8.05
8.	" taking and entering in 3 cases recognizances of defendant to appear from day to day during pendency of hearing at $1.10 each	3.30
		$2,190.65

III.

After the performance of such service as aforesaid he duly presented his accounts therefor to the circuit court of the United States for the eastern district of New York, and the same were duly approved. The part of said accounts for the period from September 30, 1882, to June 30, 1886, were presented to the proper accounting officers of the United States Treasury, and their payment was refused; the same aggregated the sum of $2,190.65.

IV.

Afterwards, as commissioner as aforesaid, other and similar services for and on behalf of the United States were performed by him, for which the United States became and was liable for the payment of his lawful fees, as follows:

1.	35 commitments at $1	$35.00
2.	Entering the same (35) at 15 cents	5.25
3.	Certifying copy process returned, etc., to court (240 folios) at 10 cents a folio	24.00
4.	48 certificates at 15 cents	7.20
5.	149 hearings at $5	745.00

6. Complaint at 15 cents folio (299 folios; 31, 4 folios; 57, 3 folios, and 2, 2 folios)	$44.85
7. 90 oaths at 10 cents	9.00
8. 90 filings at 10 cents	9.00
9. 90 warrants at $1	90.00
10. Entering return (90) at 15 cents	13.50
11. 90 filings at 10 cents	9.00
12. Order to pay witnesses (2 fols. each, 100 fols.) at 15 cents per folio	15.00
13. Filing 50 orders to pay witnesses at 10¢ each	5.00
14. Copy for marshal (100 folios) at 10 cents folio	10.00
15. 50 certificates at 15 cents	7.50
16. Taking and entering in 23 cases recognizances of defendant to appear from day to day during pendency of hearing at $1.55 each	35.65
17. 5 subpœnas at 25 cents	1.25
18. Taking recognizances in 2 cases of defendant to appear and answer indictment in U. S. court at $1.55 each	3.10
	$1,069.30

1. 24 complaints, 3 fols. each, 72 fols., at 15¢ fol.	$10.80
2. 1 complaint, 4 fols. at 15 cents	.60
3. 25 oaths at 10 cents	2.50
4. 25 filing 25 complaints at 10 cents each	2.50
5. 25 warrants at $1 each	25.00
6. Entering return of above at 15 cents each	3.75
7. Filing at 10 cents each	2.50
8. 20 commitments at $1 each	20.00
9. Entering same at 15 cents each	3.00
10. 10 subpœnas at 25 cents each	2.50
11. 25 orders to pay witnesses, 2 fols. each, 50 fols., at 15 cents	7.50
12. 25 copies for marshal, 2 fols. each, 50 fols., at 10 cents fol.	5.00
13. 25 filing above orders at 10 cents each	2.50
14. 25 certificates at 15 cents each	3.75

15. 18 certified copies process, return, etc., for the court, 5 fols. each, 90 fols., at 10 cents fol.	$9.00
16. 18 certificates at 15 cents each	2.70
17. 3 recognizances at $1.55 each (pending hearings)	4.65
18. 59 hearings at $5 each	295.00
	$403.25

V.

After the performance of such services as aforesaid he duly presented his accounts therefor to the said circuit court of the United States for said eastern district of New York, and the same were duly approved, but, being advised that the accounting officers would not pay the same, they were not presented to them for payment. The said last-named accounts covering the periods ending December 30, 1887, and June 30, 1887, aggregated the sum of $1,469.70.

Conclusion of Law.

The court determines as a conclusion of law that the claimant recover the sum of ($3,663.20) three thousand six hundred and sixty-three dollars and twenty cents.

By the COURT.

Filed June 27, 1892.
A true copy.
Test.
This 26th day of October, 1906.
[SEAL.]

JOHN RANDOLPH,
Ass't Clk Ct. of Claims.

APPENDIX "B."

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Common Law B. 369.

JOHN J. ALLEN
vs.
THE UNITED STATES.

To the Honorable CHARLES L. BENEDICT,
Judge of the District Court of the United States in and for the Eastern District of New York:

The petition of John J. Allen, the plaintiff above named, respectfully represents:

I.

That he is a citizen of the United States and a resident of the city of Brooklyn, in the State of New York.

II.

That heretofore, to wit, September 22nd, 1874, he was appointed a commissioner of the circuit court of the United States for the eastern district of New York and has continued to hold said office to the present time.

III.

That as such commissioner as aforesaid he has performed certain services in behalf of the United States and in certain matters and proceedings in and to which the United States was a party or interested, and that the United States is liable for the payment of the lawful fees for such services.

IV.

That after the performance of the services aforesaid he duly presented his accounts therefor to the circuit court

of the United States for the eastern district of New York, and the same were by the said court duly approved, but, being advised that the accounting officers would not certify the same for payment, the said accounts were not presented to said officers.

V.

That the said accounts for the services aforesaid aggregate the sum of eight hundred and twenty-six and 35/100 dollars, and that the particulars thereof are set forth in the Schedules A, B, and C hereto appended and made a part of this petition.

VI.

That no assignment of transfer of said fees or claims or of any part thereof has been made, and no part of the same has been paid or allowed in any manner to your petitioner or to any one for him.

Wherefore your petitioner prays judgment against the United States, upon the facts and law, for eight hundred and twenty-six and 35/100 dollars and costs.

JOHN J. ALLEN.

JOHN J. ALLEN,
Plaintiff, in Person,
201 *Montague St., Brooklyn, N. Y.*

EASTERN DISTRICT OF NEW YORK, *ss:*

John J. Allen, being duly sworn, says that he is the plaintiff mentioned in the foregoing petition: that he has read the same and knows the contents thereof, and the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN J. ALLEN.

Sworn to before me this 14th day of July, 1890.

B. LINCOLN BENEDICT,
U. S. Commissioner, Eastern Dist. N. Y.

SCHEDULE A.

For hearing and deciding in criminal cases upon the following days, the same not being included in any other account, viz:

1884.			
July 23.	U. S.	*vs.* H. D. Markstone ...	Hearing and deciding motion for continuance.
" 25.	"	*vs.* D. E Carpenter	Do. Do.
Sept. 19.	"	*vs.* D. E. Carpenter	Do. Do.
1886.			
Jan'y 13.	"	*vs.* F. Schink....	Do. on sufficiency of bail.
1887.			
Oct. 12.	"	*vs.* H. Joy.....	Do. as to amount of bail and motion for continuance.
	"	*vs.* R. Ribbons.....	Do. on sufficiency of bail.
1889.			
May 17.	"	*vs.* R. Balsano.....	Do. motion for continuance.

Total, 7 days, at $5.00 per day..... $35.00

SCHEDULE B.

June, 1885. For making certificates authenticating complaints and records pertaining thereto under the laws relating to the elective franchise, transmitted to the chief supervisor of elections pursuant to sec. 2027, U. S. Rev. Stat., 1,587, at 15¢.... $238.05

SCHEDULE C.

Nov., 1884, to Feb., 1885. For drawing affidavits for verification of accounts and vouchers for payment of supervisors of election and special deputy marshals for services rendered by them respectively in connection with the election for Representatives in Congress, held in November, 1884, in the eastern district of New York, 1,006 (1 fol. each), at 15¢..... $150.00

For administering oaths to the above officers respectively on the verification of accounts and vouchers last mentioned, 1,006, at 10¢.....	100.60
For certifying the administration of the above oaths on the originals and duplicates of the above accounts and vouchers, required by law, 2,012 certificates at 15¢.....	301.80
	$553.30

THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Common Law B. 369.

JOHN J. ALLEN
vs.
THE UNITED STATES.

At a stated term of the U. S. district court held in the city of Brooklyn on the 26th day of July, 1892, Hon. Charles L. Benedict holding the court.

Present: Jesse Johnson, Esq., U. S. district attorney.
John J. Allen, Esq., plaintiff, in person.

The plaintiff moves to amend the petition herein, to conform to the proofs, by striking out the last three lines of the petition, commencing with the words "Wherefore your petitioner prays," and inserting in lieu thereof the following:

"That the services aforesaid actually rendered and the full amount of the fees therefor were as follows: (1) Hearing and deciding in criminal cases, 7 days, $35; (2) making certificates authenticating complaints and records pertaining thereto, forwarded under sec. 2027, R. S., 1,587 fols., $238.05; (3) drawing affidavits of supervisors and marshals as to their services, 2,012 fols., $301.80; administering oaths on such affidavits, $100.60; certifying administration of oaths on same, 2,012 fols., $301.80; total, $977.25. Wherefore your petitioner prays judgment against the United States upon the facts and law for nine hundred and seventy-seven dollars and twenty-five cents and costs."

Motion granted and ordered that petition be amended as stated.

U. S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Common Law B. 369.

JOHN J. ALLEN
vs.
THE UNITED STATES.

And now comes Jesse Johnson, as attorney of the United States of America for the eastern district of New York, to defend the interests of the said United States in the above-entitled suit, and the said attorney, on behalf of the said United States, answering the petition herein, alleges:

1. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in said petition, and therefore denies the same.

Wherefore the said attorney, on behalf of the said United States, prays that the said petition be dismissed, and that he have his costs against the said plaintiff.

JESSE JOHNSON,
United States Attorney for the
Eastern District of New York.

EASTERN DISTRICT OF NEW YORK, *County of Kings, ss:*

Jesse Johnson, being duly sworn, says that he is the United States attorney for the eastern district of New York; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

JESSE JOHNSON.

Sworn to before me this 13th day of November, 1891.
B. LINCOLN BENEDICT,
U. S. Commissioner.

U. S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Common Law B. 369.

JOHN J. ALLEN
vs.
THE UNITED STATES.

This case having been heard upon the pleadings and proofs, the court finds as follows:

FINDINGS OF FACT.

I.

The plaintiff, John J. Allen, was a commissioner of the circuit court of the United States for the eastern district of New York, duly qualified and acting as such commissioner, from July 1, 1884, to June, 1889.

II.

During said period he performed certain services as such commissioner and thereafter presented accounts therefor. No payment has been made for said services.

III.

The services so rendered and the fees therefor were as follows:

1. Hearing and deciding in criminal cases July 23 and 25 and Sept. 19, 1884; January 13, 1886; Oct. 12, 1887; June 28, 1888, and May 17, 1889, seven days, at $5.00 per day.....	$35.00
2. *Making certificates authenticating complaints and records pertaining thereto, transmitted to the chief supervisor of elections pursuant to sec. 2027, U. S. Rev. Stat., 1,587 folios, at 15 cents per folio*.....	238.05
3. (*a.*) Drawing affidavits of supervisors of election and special deputy marshals as to the actual performance of the services rendered in connection with the congressional election of 1884, for which compensation was claimed by them in their accounts for payment, 2,012 folios, at 15 cents per folio.....	301.80
(*b.*) Administering oaths to the foregoing at 10 cents each	100.60
(*c.*) Certifying the administration of the above oaths on the accounts aforesaid, 2,012 folios, at 15 cents per folio.....	301.80

CONCLUSIONS OF LAW.

Under the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to a judgment for the sum of nine hundred and seventy-seven dollars and twenty-five cents.

CHAS. L. BENEDICT, *Judge.*

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Common Law B. 369.

JOHN J. ALLEN
vs.
THE UNITED STATES OF AMERICA.

This action having been brought by the plaintiff above named to recover of the United States of America fees for services rendered as a commissioner of the circuit court of the United States for the eastern district of New York, and the United States, by its attorney, Jesse Johnson, having appeared and joined issue by answer, and the issues in said action having come on to be tried before the Honorable Charles L. Benedict, district judge, on the 26th day of July, 1892, and the court having made and filed a finding on the facts in favor of the plaintiff for $977.25:

Now, on motion of John J. Allen, plaintiff, in person, it is adjudged that the plaintiff, John J. Allen, do recover of the United States of America the sum of $977.25, being the amount of fees due him for services as aforesaid.

Dated July 30th, 1892.

B. LINCOLN BENEDICT, *Clerk.*

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Richard P. Morle, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the transcript annexed to this certificate is a true copy of the originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the borough of Brooklyn, in the eastern district of New York, this 9th day of November, in the year of our Lord one thousand nine hundred and six.

[SEAL.] RICHARD P. MORLE, *Clerk.*

[Endorsed:] U. S. district court, eastern district of New York. John J. Allen *vs.* The United States of America. Record. Appendix "B."

APPENDIX "C."

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, do hereby certify that the orders annexed to this certificate are true copies of the respective originals on file and remaining of record in my office and recorded in the "minutes" of this court.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal of the Circuit Court, Eastern Dist. of N. Y.]

B. LINCOLN BENEDICT, *Clerk.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Monday, the first day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of S. R. HARLOW, U. S. Marshal for the Eastern District of New York.

An account of his fees and disbursements for six months ending June 30th, 1878, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, by S. R. Harlow, U. S. marshal, E. D. N. Y., duly verified by oath and in presence of A. W. Tenney, United States district attorney for said district, and it appearing to the satisfaction of this court by said oath that the services and disbursements therein charged for have been necessarily and actually performed, and no item of said account having been objected to by said A. W. Tenney, U. S. district attorney, who appears for the United States in the

matter of approval of said account, and there being, therefore, no question in regard to the said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 7th day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Charles L. Benedict, District Judge, holding the court.

In the Matter of the Approval of the Account of B. LINCOLN BENEDICT, U. S. Commissioner for the Eastern District of New York.

An account of fees and services of B. Lincoln Benedict, U. S. commissioner, for six months from January 1, 1879, to June 30, 1879, inclusive, amounting to six hundred and fifty-nine 95/100 dollars, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, by A. W. Tenney, United States district attorney for said district, duly verified by oath of said United States commissioner, and it appearing, to the satisfaction of the court by said oath that the services of said commissioner therein charged for have been necessarily and actually performed, and no item of said account having been objected to by said U. S. district attorney, who appears for the United States in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant, it is—

Now ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Monday, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: Hon. Charles L. Benedict, District Judge.

In the Matter of the Approval of the Account of ASA W. TENNEY, United States District Attorney for the Eastern District of New York.

An account of his fees and services for three months ending September 30th, 1879, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved February 22, 1875, by Asa W. Tenney, duly verified by oath of said Asa W. Tenney, United States district attorney for said district, and it appearing to the satisfaction of this court by said oath that the services therein charged for have been necessarily and actually performed from July 1st, 1879, to September 30th, 1879, inclusive, and no objection appearing to any item of said account, and there being, therefore, no question in regard to the said account presented for determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant, it is now—

Ordered that said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT,
U. S. Judge.

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on

Saturday, the tenth day of January, in the year of our Lord one thousand eight hundred and eighty.

Present: Hon. Charles L. Benedict, district judge.

In the Matter of the Approval of the Account of ASA W. TENNEY, United States District Attorney for the Eastern District of New York.

An account of his fees and services for three months ending December 31st, 1879, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved February 22, 1875, by Asa W. Tenney, duly verified by oath of said Asa W. Tenney, United States district attorney for said district, and it appearing to the satisfaction of this court by said oath that the services therein charged for have been necessarily and actually performed from October 1st, 1879, to December 31st, 1879, inclusive, and no objection appearing to any item of said account, and there being, therefore, no question in regard to the said account presented for determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant, it is now—

Ordered that said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT,
U. S. Judge.

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 2nd day of July, in the year of our Lord one thousand eight hundred and eighty.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York.

An account of the fees and services of John J. Allen, U. S. commissioner for six months ending June 30th, 1880,

amounting to $764 30/100, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, by A. W. Tenney, Esq., U. S. district attorney, duly verified by the oath of the said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that the services therein charged for have been actually and necessarily performed, and no item of said account having been objected to by said U. S. attorney, who appears for the United States in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is now ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

[SEAL.] CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York.

An account of the fees and services of John J. Allen, U. S. commissioner, for six months ending December 31st, 1881, amounting to $627 55/100, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, by A. W. Tenney, Esq., U. S. district attorney, duly verified by the oath of the said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that the services therein charged for have been actually and necessarily performed, and no item of said ac-

count having been objected to by said U. S. Attorney, who appears for the United States in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is now ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 31st day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York.

An account of the fees and services of John J. Allen, U. S. commissioner, for the period ending December 31, 1883, amounting to $1,242.35, having been submitted for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by the said U. S. district attorney, who appears for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 9th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York.

An account of the fees and services of John J. Allen, U. S. commissioner, for the period ending June 30, 1885, amounting to $544 20/100, having been submitted by M. D. Wilber, U. S. district attorney, for approval, pursuant to the act of Congress entitled "An act regulating fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by the said U. S. district attorney, who appears for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being in law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the third day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of RICHARD P. MORLE, United States Commissioner for the Eastern District of New York.

An account of fees and services of Richard P. Morle, United States commissioner, for the period ending December 31, 1887, amounting to $380 20/100, having been submitted by Mark D. Wilber, Esq., United States district attorney for said district, for approval, pursuant to the act of Congress entitled "An act to regulate fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of the said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that said services therein charged for have been necessarily and actually performed, and no item of said account having been objected to by said U. S. district attorney, who appears for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant, it is—

Ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held in the United States court-rooms, in the city of Brooklyn, on the 29th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York, for Certain Services, as Stated.

An account of John J. Allen, U. S. commissioner, for certain services rendered in criminal cases during the period ending June 30, 1890, amounting to $206 95/100, having been submitted by John Oakey, Esq., assistant U. S. district attorney, for approval, pursuant to the act of Congress entitled "An act for regulating fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by the said U. S. district attorney, who appears for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held in the United States court-rooms, in the city of Brooklyn, on the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of JOHN J. ALLEN, U. S. Commissioner for the Eastern District of New York, for Certain Services, as Stated.

An account of John J. Allen, U. S. commissioner, for certain services rendered in criminal cases during the period ending June 30, 1892, amounting to $267 75/100, having been submitted by John Oakey, Esq., assistant U. S. district attorney, for approval, pursuant to the act of Congress entitled "An act for regulating fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of said U. S. commmissioner, and it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by the said U. S. district attorney, who appears for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant—

It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge*.

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 6th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

In the Matter of the Approval of the Account of RICHARD P. MORLE, United States Commissioner for the Eastern District of New York.

An account of fees and services of Richard P. Morle, United States commissioner, for the period ending December

31, 1892, amounting to $227 15/100, having been submitted by John Oakey, Esq., United States district attorney for said district, for approval, pursuant to the act of Congress entitled "An act to regulate fees and costs, and for other purposes," approved Feb. 22, 1875, duly verified by the oath of the said U. S. commissioner, and it appearing to the satisfaction of the court by said oath that said services therein charged for have been necessarily and actually performed, and no item of said account having been objected to by said U. S. district attorney, who appeared for the Government in the matter of the approval of said account, and there being, therefore, no question in regard to said account presented for determination of the court, and the said account being by law subject to revision by the accounting officers of the U. S. Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant, it is—

Ordered that the said account be, and the same is hereby, approved to the above extent, subject to the revision aforesaid.

CHAS. L. BENEDICT, *Judge.*

Endorsements: Court of Claims. U. S. circuit court, eastern district of New York. Certified copies of orders approving accounts. No. 17,349. John J. Allen *vs.* The United States. Claimant's Exhibit "G." C. C. Lancaster, attorney for claimant. Filed Apr. 30, 1897. Court of Claims.

A true copy.
Test.
This 13th day of November, 1906.
[SEAL.]
JOHN RANDOLPH,
Ass't Cl'k, C't of Claims.

[Endorsed:] U. S. circuit court, eastern district of New York. Certified copies of orders approving accounts. Appendix "C."

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

Supreme Court, U.
FILED.
JAN 29 1907
JAMES H. McKENNEY
CLERK

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

CHARLES CALVERT LANCASTER,
Counsel for Appellant.

HERBERT E. SMITH,
Of Counsel.

Byron S. Adams (Inc.), Printer, Washington, D. C. 24804

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 192.

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

Appellee's brief, page 2, referring to Item 1, as found, says: "The accounting officers allowed 15 cents per folio for said complaints, and appellant now claims 5 cents additional."

To correct a possible inference from this that the 5 cents additional was a disallowance in a former account, we refer to the finding (R., p. 7) that the 15 cents was the full amount *charged* in the former account, and that none of the fees now claimed were ever charged in any account other than the one now sued upon, which was a *new* account.

Counsel for appellee, on page 4 of his brief, contends that it was the duty of the appellant before drawing a complaint to satisfy himself of the probability of the commission of the offense alleged, as he had the means to satisfy himself on this point, because he was chief supervisor of elections as well as commissioner, and had in his hands, counsel says, lists of all persons entitled to vote.

The fallacy of this contention is based upon the fact that the appellant happened to hold the office of commissioner and chief supervisor of elections. This fact does not sustain his assertion, and he cites no authority to support it. Neither is there any finding of fact in the record to sustain such a statement.

There is no finding of fact in the record that appellant did not satisfy himself of the probability of the commission of every offense in these complaints.

The presumption of law is that an officer does his duty in the absence of proof to the contrary. This presumption is fortified by the fact shown by the record that the accounts containing these complaints were approved by the United States court in the district where the services were rendered, adjudging "that the services herein charged for have been necessarily and actually performed."

Further, the Record, page 10, under Item 23, shows that the appellant made a distinction between cases in which he was satisfied that an offense had been committed and those in which, on further examination, it appeared that the offense, although charged, should not warrant an arrest. In Item 23 he charged for complaints in the cases in which, as the court below finds, "no warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences."

The appellee's attorney seems to criticize, on page 4 of his brief, what he speaks of as an inference that a complaint was drawn wherever it was reported that an offense had been

committed, and that the investigation which should have preceded the drawing of the complaint was not made until subsequent thereto, and he suggests that the commissioner was not required to draw a complaint in every case where it was represented that an offense had been committed.

It would certainly be a plain dereliction of duty on the part of a commissioner to refuse to take a complaint charging a violation of law. If, afterward, instead of at once issuing a warrant, as he might properly do, he pursues an investigation and examination which satisfies him and the district attorney that the case ought not to be prosecuted further, such course may be commended, but he cannot lawfully decline to take the complaint in the first instance, and when taken he is entitled to payment therefor. The New York statute which governs him provides: "When an information is laid before a magistrate of the commission of a crime, he must examine on oath the informant and prosecutor and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them," and "if the magistrate be satisfied therefrom that the crime complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest" (Secs. 148-150, N. Y. Code of Crim. Proc.).

The taking of the complaint is therefore an act complete in itself, and necessarily precedent to the issue of the warrant and subsequent examination.

The theory of the government's counsel seems to be that the commissioner should investigate an offense before any charge is made before him that an offense has been committed. How is the commissioner to determine whether an offense has been committed or who had committed it until a formal complaint under oath has been made before him charging a violation of law?

That no needless or superfluous complaints were taken is

evident from a brief reference to the figures showing the number of complaints taken.

In the finding upon Item 23 (R., p. 9) the charge for the complaint and other services where no warrant was issued is stated to be $1.15, showing that the $742.20 charged in that item covered rather less than 650 such complaints. The period as stated in the findings (R., p. 7) embraced three congressional elections, making an average of less than 220 such complaints at an election. This, in a city of nearly a million people, which will be conceded as Brooklyn's population, gives an average of one such complaint to about 4,500 people, certainly a much smaller number than might be expected under such conditions.

The finding as to Item 1 states the folios of complaints at the two elections of 1886 and 1888 as 3,915 folios, of which 367 folios were for crimes of a general character, leaving 3,548 folios in election cases which, at four folios each, as stated on Record, page 9, gives 887 complaints at the two elections, or an average of 444 at an election. This for approximately a million of people averages one such complaint to over 2,200 people, which is certainly a minimum number, especially in view of the fact that one of these elections was a Presidential election, with its attendant excitement and incentives to fraudulent registration and voting.

It is manifest from the foregoing that whatever a casual view of the charges might suggest an examination of the figures in detail shows clearly that the verified complaints taken were far fewer in number than might reasonably be expected, and that the appellant was entitled to especial commendation for pursuing a course keeping the expense of enforcing the election law, through its penal provisions, down to so low a figure in the manner indicated.

Further, the attention of this court is especially called to the express language of the order of the United States district court for the eastern district of New York, as set forth in Finding 2 of the Court of Claims (R., p. 7), which

is similar in all respects to all other orders of said court in the premises, as shown by Appendix C, approving the accounts of appellant herein sued for, and other accounts covering a period from 1878 to December, 1892, as follows:

"And it appearing to the satisfaction of the court by said oath *that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the government in the matter of the approval of said account,*" * * *

Here we see that the United States district attorney, having immediate cognizance and control of the particular cases wherein charges are made was *present in court,* and being informed of all the facts and particulars of each and every case and charge, made no objection to the approval of said account wherein such charges were made. The court also finds that the services were *necessarily* performed. These facts should enlighten this court greatly in its consideration of the statement contained in Finding III, Items 1 and 2, viz.: "No arrests were made because inquiry developed the fact that no offense had been committed."

Counsel for appellee, in his brief, on pages 5 and 6, makes certain reference to Item 11 (R., p. 9), in which he admits that the certificates charged for were upon the *original* complaints, but by way of excuse for the non-payment of this charge, states appellant "was both the Commissioner who *pretends* to have certified the complaints and records pertaining thereto and the chief supervisor to whom the certificates would go."

In answer, appellant calls attention to the fact that the court below, by said Item 11, in Finding III, found that said "certificates" were *actually made* upon the papers in question, and filed in the office of the chief supervisor of

elections, as claimed by appellant, and, therefore, the use of the words "who *pretends* to have certified the complaints and record, etc.," is not warranted by the findings.

The statute required the forwarding, with the complaints, of all examinations, papers and records pertaining thereto (R. S., Sec. 2027), for preservation and future reference, and it was manifestly essential that the papers in each, which might be numerous and not in themselves necessarily showing what they were, should be put together, and in such form authenticated by a certificate showing what they were, and their official character entitling them to be filed and preserved, not only for information of the chief supervisor who filed them, but for all persons or courts having occasion to call for them in the future (see also first brief, p. 22).

Counsel for appellee in his brief (p. 6) contends that there was no necessity for certificates to complaints and other papers referred to in Item 11.

The contrary is apparent from the two judgments referred to on page 24 of our first brief, one by the Court of Claims, and another by the United States District Court for the eastern district of New York, as shown in appendix to our first brief, "A and B," and no appeal was taken by the Attorney General in either case. In U. S. *vs.* Finnell (185 U. S., 244), where a judgment had been rendered by the Court of Claims in another suit in favor of the appellant for similar services, and no appeal was taken by the Attorney General, the Supreme Court said:

"On his account, for the period from January 1st, 1892, to June 30, 1894, he obtained judgment in the Court of Claims, which judgment was paid, no appeal having been prosecuted by the United States (Finnell *vs.* U. S., 32 Ct. Cls., 634). It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction."

The principle here announced applies with equal force to the construction placed upon the fee bill by the appellant in this case.

Appellee's counsel seems to regard the so-called Tucker Act of 1887 as authorizing the allowance of the counter-claim, even though the accounts on which it was based were not opened by appellant, and even though no running account existed between appellant and the United States.

The Tucker Act made no change in the law applicable to this counter-claim.

Sec. 1059, R. S., gave the Court of Claims jurisdiction to hear and determine certain matters, among which were:

"All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any person making claim against the Government in said Court."

The Act of March 3, 1887, added certain classes of claims of individuals to those suable in the Court of Claims, and deprived it of jurisdiction over certain others. For example, it added all claims in respect of which the party would be entitled to redress in a court if the United States were suable, and took from it claims for pensions, war claims, etc. The purpose of the act was declared in its title, "An act to provide for the bringing of suits *against* the Government of the United States." It was intended to benefit the claimant, and did so materially by permitting him to sue also in the local district courts in certain cases.

It left the status of the Court of Claims as to counter-claims unchanged, giving to that court jurisdiction to hear

"All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against, etc."

These are the exact words of the old statute. The law has not been changed and the rules and decisions governing the allowance of counter-claims stand unaffected, and as stated in our first brief. The case of *Atlantic Contracting Co.* (35 Ct. Cls., 30), cited by counsel merely held that that court has jurisdiction to hear a claim "which can be *properly pleaded* by way of set-off or counter-claim."

This is no way conflicts with the point made in our first brief, that the counter-claim in this suit should not be allowed because it is not such a claim as can be properly maintained under the law and authorities which we have cited.

We also refer to the following case, where the same principle was announced: Patterson *et al. vs.* The United States, 28 Ct. Cls., 321.

In this connection we deem it proper to call attention to the relation between the items in the findings (R., p. 10) and the *periods* of the accounts in the counter-claim which are unconnected and as follows:

Period of 1st counter-claim, July to Dec., 1886.
" " 2nd " July, 1888, to June, 1889.
" " 3rd " July, 1890, to June, 1891.
" " 4th " July to Dec., 1892.

No item in the findings relate to the above 4th period.

Item 1 is found as from Feb'y, 1886, to June, 1889, which includes four months preceding the above 1st period and one and one-half years between the 1st and 2nd periods.

The other items disallowed are found generally as from Feb'y, 1886, to January, 1892 (R., p. 7), but no precise dates are found. There was one and one-half years between the above periods of 1st and 2nd counter-claims and a year between the 3rd and 4th.

There was no definite relation, therefore, between the items and particular accounts in the counter-claim.

That the counter-claim is not such a claim as can properly be maintained in this suit is clearly shown by the following points:

The services and fees in the accounts covered by the counter-claim were authorized by sections 1982, 828, 847, Revised Statutes (First Brief, p. 25).

The accounts in the counter-claim were presented in the presence of the U. S. Attorney to the U. S. court, which entered orders approving them as just and according to law, and they were afterward submitted to the accounting officers, and, after examination and explanations duly furnished, were paid (First Brief, p. 26).

There is not a scintilla of proof in the record that the United States court made any mistake in approving the accounts in the counter-claim, and in the absence of such proof the orders of approval are conclusive (First Brief, p. 26).

The accounts in the counter-claim were not allowed by the accounting officers by *mistake,* but in accordance with the uniform and continuing practice and construction of the law for many years allowing detail fees and no others in election cases, both before and after arrest (First Brief, p. 27).

The accounts in the counter-claim were allowed in accordance with a uniform practice of long standing never then questioned, and now objected to upon a point of law *now raised for the first time and not yet decided* (First Brief, p. 27).

No accounts here sued upon reopen any former accounts settled and paid. The court below found that *"No disallowed balance in any account to which the counter-claim relates is sued for herein"* (R. p. 10), and *"The fees in Items 1 to 17 are not balances unpaid upon accounts presented and settled by the accounting officers; they are fees not previously charged in any former account"* (R., p. 9).

No running account exists between the government and a commissioner of the circuit court (First Brief, p. 29).

The circumstances connected with the court's approval,

the investigation and the allowance and payment of the accounts counter-claimed are such as to make recovery inequitable, unjust, and unlawful (First Brief, pp. 32-42).

Counsel for appellee appears to criticize the production of certified copies of certain court records and annexing them to our brief for reference.

We reply that it is assumed that this court will take judicial notice of all judicial proceedings of a court of record, whether published in printed volumes of reports, or brought into court as certified copies, if not printed in such volumes.

The copies in question are judicial proceedings in courts of record, and as they do not appear in any printed volumes it is impracticable to produce them in any other way than as certified copies, and they are therefore presented to this court for its inspection as judicial authorities.

CHARLES CALVERT LANCASTER,
Counsel for Appellant.

HERBERT E. SMITH,
Of Counsel.

FILE COPY.

Office Supreme Court U. S.
FILED
FEB 19 1906
JAMES H. McKENNEY,
Clerk.

No. [redacted]192

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN J. ALLEN, APPELLANT,
v.
THE UNITED STATES, APPELLEE.

BRIEF OF UNITED STATES IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN J. ALLEN, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 569.

BRIEF OF UNITED STATES IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

(1) Appellant asks that a certiorari be issued to the Court of Claims, directing it to send up certain evidence which was before it in the trial of this cause. It is alleged, in effect, that said evidence will convince this court that the Court of Claims was in error in finding that—

> The court declined to make the usual order of approval, but made an order which, after reciting the proper presentation, said:
>
> And it appearing to the satisfaction of the court by said oath that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the Government in the matter of the approval of said account, and there being therefore no question in regard to

> said account presented for the determination of the court, and the said account being by law subject to revision by the accounting officers of the United States Treasury, and my official action herein being limited to the particulars of which I am judicially cognizant,
>
> It is ordered that the said account be, and the same hereby is, approved to the above extent, subject to the revision aforesaid. (40 C. Cls. R., 172.)

The mere statement of this proposition is a sufficient warrant for the refusal of the writ. Rule 14 can not be invoked for any such purpose. As this court said in the case of Adams (6 Wall., 101):

> To do so would require an examination of evidence, and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of the jury, and which, by our rule, we intended to exclude from the consideration of this court, by making such finding by the Court of Claims conclusive.

Appellant failed to pursue his remedy in the Court of Claims by moving to have the findings amended. He perfected his appeal, and it seems clear that he is now too late in making this objection. If the Court of Claims had failed to find upon the subject-matter involved herein it might then be competent to require the evidence constituting the exhibits indicated to be certified to this court in order to complete the record, but, inasmuch as the Court of Claims made a clear, positive, and unequivocal finding, showing the form and

character of the order of approval granted by the trial court which approved the accounts in question, it is not possible to now attack the veracity of that finding in this court, and the motion should be dismissed.

To the proper issuance of a certiorari it should appear on the face of a record that there is a material deficiency. (*Elmore* v. *Grymes*, 1 Peters, 469.) The claim here is not that the court omitted to make a finding on a material point, but that the finding made is erroneous.

(2) Appellant asks that a certiorari be issued to the Court of Claims, directing it to send up certain records and reports which were before it in the trial of this cause, and which, it is alleged, will convince this court that the Court of Claims was in error in finding that—

> The accounts presented by the claimant for said services amounted to the sum of $3,120, which said sum was allowed and paid the claimant by the accounting officers *by mistake*, and in pursuance of the then practice of the accounting officers to allow detail fees in proceedings of that character. (40 C. Cls. R., 176.)

It is urged that the records and reports aforesaid will show that the payment by the accounting officers was not made "by mistake;" that they perfectly understood all the facts pertaining to the circumstances under which the services were rendered and the accounts presented.

This request is subject to the objections before stated. The allowance of the request would require

the court to go behind the findings of the Court of Claims on the subject and examine the testimony, a thing which this court has declared it will not do. (Adams case, *supra.*)

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

FILE COPY.

Office Supreme Court, U.
FILED.
JAN 24 1907
JAMES H. McKENNEY
CLERK

No. 192.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JOHN J. ALLEN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JOHN J. ALLEN, APPELLANT,
v.
THE UNITED STATES.
No. 192.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

From January, 1886, to January, 1892, appellant was a commissioner of the Circuit Court of the United States for the Eastern District of New York. He was also chief supervisor of elections in and for said judicial district. During this period he performed certain services, as such commissioner, in connection with the prosecution of alleged violators of the provisions of chapter 7, title, "Crimes," Revised Statutes of the United States. Certain of his accounts for said services having been disallowed by the accounting officers, he brought suit in the Court of Claims February 1, 1892, to recover the same. On February 20, 1896, the United States filed a counterclaim for the sum of $3,120, which it was alleged had been wrongfully and un-

lawfully paid appellant by the defendants' accounting officers.

On January 9, 1905, final judgment was entered by the Court of Claims, in which certain items claimed were disallowed and the counterclaim aforesaid was allowed. From this judgment the claimant below appealed.

ARGUMENT.

The first error assigned is as to the disallowance of part of items 1 and 2 and all of items 11, 20, and 23 of the third finding of fact.

1. Item 1, it is found by the Court of Claims, is for drawing complaints of affiants in various criminal cases for offenses against the laws of the United States, 3,915 folios, at 20 cents per folio. 3,548 of said folios were charged in cases where the complaints set forth offenses under chapter 7, title "Crimes," Revised Statutes, and in which cases "warrants, if issued, were never served because inquiry developed no offense had been committed." (Rec., pp. 7 and 8.) The accounting officers allowed 15 cents per folio for said complaints and appellant now claims 5 cents additional, or $177.40.

It will be conceded that in the prosecution of ordinary criminal cases Circuit Court commissioners were entitled to 20 cents per folio for drawing complaints as for "taking and certifying depositions to file." (Sec. 847, R. S.; *United States* v. *Barber,* 140 U. S., 164.) But by virtue of section 1986, Revised Statutes, detailed fees as prescribed for commissioners in said section 847 are not allowable where the proceedings before the commissioners were for violation of

the provisions of said chapter 7, title "Crimes," Revised Statutes of the United States. (See also sec. 1982, R. S.)

It will be noted that section 1986 provides a fee of $10 for the commissioner's services "in each case, *inclusive of all services incident to the arrest and examination,*" where the offense charged is a violation of some one or more of the provisions of said chapter 7, title "Crimes." The drawing of the complaints charged for in this item was a service incident to the arrest and examination. But there was no arrest or examination. It has been held by this court that under such circumstances there is no "case" within the meaning of section 1986; that the mere filing of a complaint and the issuing of a warrant thereon is not sufficient to entitle the commissioner to the $10 prescribed for his services "in each case." (*Southworth* v. *United States,* 151 U. S., 179-185.)

But appellant insists that the decision of the court in the *Southworth* case does not preclude the commissioner from charging and receiving the fees prescribed in section 847 for such services as were rendered in good faith. It is our contention that said section 1986 provides an *exclusive* fee for the commissioner in all cases where the offense charged is a violation of the provisions of said chapter 7, and that he can not legally receive *any* compensation whatever in any case brought under said chapter unless the proceedings have advanced far enough to make it a "case" within the definition given by the court in the *Southworth* case. The question of whether the commissioner acted in good faith in drawing the complaints does not enter in. It does not follow that because in good faith he performed some service in these matters under circumstances which preclude the payment of the statutory fee of $10 he must be paid

something therefor. Not every service which is required of a public officer is to be paid for. "Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor any discretionary action on the part of the officials." (*United States* v. *Shields*, 153 U. S., 88.) See also *United States* v. *Patterson* (150 U. S., 65-69).

The commissioner in this case had control over the matter of drawing complaints. He was not compelled to draw a complaint in every case in which it was reported or represented to him that an offense had been committed. It was his duty before drawing a complaint to satisfy himself of the probability of the commission of the offense alleged. He had the means at hand to satisfy himself on this point, from the fact that he was also chief supervisor of elections at the time, and as such had in his hands, or at his command, lists containing the names of all persons entitled to vote. Before drawing a complaint against any individual alleging a violation of any of the provisions of said chapter 7 he could have known at once, by reference to said lists, where the individual charged was registered and whether or not there was any probability of convicting him of an offense under said provisions of the law. That he did not make such investigation is manifest from the fact that in many, if not all, of the cases in which these services were performed warrants were not issued at all, and if issued, were never served "because inquiry developed no offense had been committed." The inference is irresistible that a complaint was drawn in every instance where it was by any possibility suggested that an offense had been committed, and that the

investigation, which should have preceded the drawing of the complaint, was not made until subsequent thereto.

However, we rely upon the proposition above indicated, that he is not entitled to *any* compensation for services rendered in proceedings of this kind unless there was an arrest and examination.

If the contention of the United States is correct, it follows that the payment of 15 cents per folio made to appellant for complaints was erroneously and unlawfully made. The amount thereof is included in the counterclaim.

Item 2 is for drawing jurats to complaints of affiants charging offenses against the laws of the United States. Two thousand one hundred and ninety-two of said jurats were to complaints where the offense charged was under said chapter 7, title "Crimes." Warrants, if issued thereon, were never served. No arrests were made, because inquiry developed the fact that no offense had been committed. (Rec., p. 8.)

Under the provisions of section 847, the Circuit Court commissioner was entitled to 15 cents for the jurat to each oath in ordinary criminal proceedings, but, for the reasons before given, appellant is not entitled to any compensation whatever for the jurats charged.

Item 11 (Rec., p. 9) is for certifying complaints in various criminal proceedings for violation of the elective franchise, with the records pertaining thereto, in connection with the Congressional elections of 1886, 1888, and 1890, for transmittal to the chief supervisor of elections, to be filed by him as records of his office. One folio was charged in each case at 15 cents per folio.

It is found by the court in connection with this item that the appellant was at the same time the commissioner who

certified and the chief supervisor of elections to whom he certified said complaints. Section 2027, Revised Statutes, requires that the commissioner who performs any duties relating to, concerning or affecting the election of Representatives or Delegates in Congress shall forward to the chief supervisor in and for the judicial district the *original* complaints, etc. There was, therefore, manifestly no necessity for certificates to these complaints and other papers.

The only possible excuse for a certificate to these papers would be to advise the chief supervisor, to whom they were forwarded, that the papers so forwarded were original papers. When we consider that the appellant here was both the commissioner who pretends to have certified the complaints and records pertaining thereto and the chief supervisor to whom the certificate would go, the absurdity of the matter is obvious. He must have known, in his capacity as chief supervisor, just what the papers were as well as he knew it in his capacity as commissioner.

These complaints and other papers must necessarily have been a part of the record or related directly to "cases" pending before the commissioner for alleged commission of offenses under said chapter 7. Their transmission to the chief supervisor was incident to the services for which a fee of $10 is prescribed by section 1986.

Item 20 (Rec., p. 9) is for filing and entering 2,180 separate complaints and warrants of arrest issued for violation of the election laws in connection with the Congressional elections of 1888 and 1890, where the warrants were returned unexecuted by the marshal, at 10 cents each, $218.

All of these services were rendered in cases where the offense charged was a violation of some one or more of the

provisions of chapter 7, title "Crimes," Revised Statutes. The disallowance by the Court of Claims of this item should be sustained, for the reasons heretofore stated.

Item 23 (Rec., pp. 9 and 10) is for drawing depositions for complaints in various cases of illegal registration—4 folios in each case, at 20 cents a folio; oath to affiant, 10 cents; drawing jurat to same, 15 cents; filing complaints, 10 cents each, $742.20.

These services were all charged in civil rights proceedings. As the result of scrutiny of the lists of voters by the commissioner and inquiry at residences, no warrant in any of said instances was issued. For the reasons already stated in connection with the preceding items the disallowance should be sustained, but aside from that it is a service which could not be paid for in any case, whether the proceedings were brought under the civil rights act or under the general provisions of the statute regulating criminal proceedings. (See *Patterson case,* 150 U. S., 65.)

2. The second error assigned is the refusal of the Court of Claims to render judgment in favor of the claimant in the amount claimed in the items above indicated. It follows, as a matter of course, that if the conclusion of law made by the court below disallowing charges made under said items was correct, the refusal to render judgment in favor of the claimant was correct.

THE COUNTERCLAIM.

The third assignment of error is the allowance of the counterclaim filed by the United States.

The fourth finding of fact (Rec., p. 10) relates to the counterclaim. It appears therefrom that the sum which the United States now seeks to recover from appellant was originally charged by him for drawing and filing complaints and for issuing and entering return of marshal on warrants in cases where the offense charged was a violation of the provisions of chapter 7, title "Crimes," and in which no arrests were made in any instance and no examination was held. The fees allowed by the accounting officers were the detailed fees prescribed by sections 847 and 828, Revised Statutes. The court below, in its conclusions of law, held that the defendants, the United States, are entitled to recover judgment on said counterclaim "because of charges illegally and by mistake paid" to the appellant.

The first question which presents itself for solution in connection with this counterclaim is the validity of the act or acts of the accounting officers in paying said charges. The court will have reached a conclusion as to this question in the consideration of the first item referred to in the appellant's first assignment of error. Should the decision be that the Court of Claims was in error in disallowing the charges for drawing complaints in proceedings brought under the "election" law, it follows that the court was also in error in allowing the counterclaim. If, on the other hand, the decision should sustain the action of the court below with reference to said item 1, its action in allowing the counterclaim must be likewise sustained, unless, as is

contended by the appellant, said court had no jurisdiction to entertain the counterclaim.

It is well settled that the United States is not bound by the unauthorized and unlawful acts of its officers and agents, and that money paid to an officer or to anyone else in violation of law—that is to say, without authority of law—can be recovered back. Neither is there any statute of limitations against the United States. Such right of action is not limited by time, nor place, nor circumstances. The Government can go into any court having jurisdiction of the person or property of the person so unlawfully receiving money and recover it.

> *United States* v. *Burchard* (125 U. S., 176-180).
>
> *Wisconsin Central R. R. Co. United States* (164 U. S., 190).
>
> See also authorities cited by the Court of Claims in its opinion (Rec., p. 20).

The Court of Claims has jurisdiction, by virtue of the first section of the Tucker Act (24 Stat. L., 505), to consider and determine—

> All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against the Government in said court.

Any person who invokes the jurisdiction of said court for his own purposes thereby submits himself to its jurisdiction. It does not matter whether appellant voluntarily opened the accounts upon which the counterclaim is based, or whether a *running* account existed between the appellant

and the United States, or whether the subject of the counterclaim arose out of the same subject-matter as the suit against the United States; the Court of Claims has jurisdiction to entertain and adjudicate any "demands whatsoever" which the Government may have against the party bringing the suit in the Court of Claims. (*Atlantic Contracting Company*, 35 C. Cls. R., 30.)

The payment to the appellant of the $3,120 named in the counterclaim was, we believe, a mistake of law. If so, the right to recover back was a "demand," within the meaning of that part of the first section of the Tucker Act above quoted.

The appellant argues in his brief (p. 26) that the record does not show any evidence that the court which approved the accounts of the appellant made a mistake in so doing, and that, therefore, the approval must be accepted as conclusive and binding upon the United States. In support of this contention, *Jones* (134 U. S., 483), *Barber* (140 U. S., 179), and *Nix* (189 U. S., 206) are cited.

It is submitted that in effect these decisions simply declare that the approval by the court of the account of an officer is *prima facie* evidence of the fact that the services therein charged for were performed, a fact which was not disputed in this case, and that the fees claimed for such services were the fees named in the account. It is not held by said decisions that the approval of the account establishes *prima facie*, the validity or legality of the charges made in the account. That is a matter which is left for the determination of the accounting officers or of the Court of Claims, in which only can a suit for fees and compensation be brought by public officers.

During the pendency of this appeal counsel for appellant made an application for a writ of certiorari to be issued to the Court of Claims, directing it to send up certain evidence and records which were before it in the trial of this cause, the effect of which, it was alleged, would be to convince this court that the Court of Claims was in error with respect to the second finding, second and third paragraphs (Rec., p. 7); also that the court was in error in finding that the sum named in the counterclaim had been paid "by mistake," as stated in the fourth finding of fact (Rec., p. 10).

This court declined to issue the requested writ of certiorari, and counsel for appellant apparently seeks now to accomplish what they then failed to do—get said evidence and records before this court—by including the same as appendices to the brief for appellant.

J. A. Van Orsdel,
Assistant Attorney-General.

Philip M. Ashford,
Special Assistant Attorney.

Supreme Court of the United States.

No. 192.—October Term, 1906.

John J. Allen, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[February 25, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a claim made by a commissioner of the United States Circuit Court for services rendered between January 29, 1886, and January 20, 1892, charges for which were disallowed by the officers of the Treasury Department. It is necessary to state only the items and matters now in controversy. Item 1, so far as disallowed by the Court of Claims, is for drawing complaints which charged offences under the Revised Statutes, Title Crimes, (70,) ch. 7, (Crimes against the Elective Franchise and Civil Rights of Citizens,) and upon which warrants never were served "because inquiry developed no offence had been committed." The disallowed portion of item 2 is for drawing jurats to similar complaints of which the same facts were true. Item 11 is for certifying complaints for offences under said ch. 7, the claimant being the chief supervisor of elections, to whom he, as commissioner, certified the complaints. Item 20 is for filing and entering similar complaints, in civil-rights proceedings, where the warrants were returned unexecuted by the marshal. Item 23 is for drawing depositions for complaints in similar proceedings, where "no warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences." These are the disallowed claims brought here by this appeal.

By Rev. Sts. § 1986, district attorneys and others mentioned are to be paid for their services under the provisions for enforcing said ch. 7 "the same fees as are allowed to them for like services in other cases." The sentence then goes on: "; and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination." It is established and admitted that this fee is not earned, (because there is not a 'case' within the meaning of the section,) unless there be an arrest and an examination. *Southworth* v. *United States*, 151 U. S. 179, 185. s. c. 161 U. S. 639. And again, it is plain that the fee, when it is earned, covers all services; as sufficiently appears from the contrast to the allow-

ance of the usual fees to others in the earlier part of the same sentence and from the final words of the entitling clause. These two propositions granted, it seems to us not to need argument to conclude that unless the fee is earned the commissioner gets no other. This section having supplanted the usual provisions of §§ 823, 828, 847 for the cases to which it refers, cannot be held to leave open a resort to § 847 when the conditions attached to the substituted compensation are not fulfilled.—This disposes of all items except 11, which stands on a different ground. As to that a few words are enough. By Rev. Sts. § 2027 it was the claimant's duty as commissioner to forward the original complaint, &c., to the chief supervisor for the judicial district. As he was supervisor as well as commissioner this section merely required a change in the character of his custody. No certificate was necessary, and if the complaints were certified it can have been only for the purpose of charging fees. But further, if that duty had been added to the others in connection with cases covered by § 1986, the mere fact that the addition was by a later statute would not break in upon the rule established by § 1986, that the compensation for all the services was entire.

The first item is not for the whole service of drawing the complaints. It admits the receipt of fifteen cents per folio and demands five cents more on the strength of cases decided after the claimant had been paid upon his former account. *United States* v. *Ewing*, 140 U. S. 142. *United States* v. *Barber*, 140 U. S. 164. These cases being decisions under Rev. Sts. § 847, are not in point. But, if that be in any way material, they had the effect of inducing the applicant to open his account. The present is called a new account in argument to be sure. But it is hard to conceive a more distinct opening than the demand of money in addition to sums received at the time as full payment for indivisible items. On the claimant's own view of his rights, there were not two charges for each folio, one for fifteen cents and another for five. He asserted one indivisible right on which he had been paid fifteen cents in full and he now said that that was not enough. The United States, by way of counterclaim to this attempt to get additional pay, demanded the sums already paid to the claimant contrary to the principle that we have laid down, and the Court of Claims allowed an offset of $3,120, found to have been paid by mistake, against the larger sum that it found due to the claimant. We see no reason to doubt the right of the United States, or the legality of its asserting that right by counterclaim. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190. *United States* v. *Burchard*, 125 U. S. 176. *McElrath* v. *United States*, 102 U. S. 426. It is urged that the account was approved by the United States Circuit Court. The account was approved, "subject to revision by the accounting officers of the United States Treasury" only. On the findings

on which the case comes before us this qualified approval has no weight. One portion of the counter-claim is for dates later than the filing of the claim. But, in view of the broad language of the statutes, ("all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever," Rev. Sts. § 1059, clause 'second'; Act of March 3, 1887, c. 359, § 1, clause 'second,') we are of opinion that it properly was allowed with the rest.

The case was elaborately argued at the bar, and is discussed at length in printed briefs. We have examined all the details of the latter, but do not deem it necessary to add more to the careful consideration that the case received in the Court of Claims.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.